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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

EDMUND BURKE,
Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY,
Appellees.
No. 279

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY,
Appellees.
No. 280

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

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Supreme Court of the United States,

OCTOBER TERM, 1912.

EDMUND BURKE, Appellant, vs. SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, Appellees.	No. 682.
J. I. LAMPRECHT and F. M. AIKEN, Trustees, Appellants, vs. SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, Appellees.	No. 683.

On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEES.

Statement.

This is a suit in equity instituted by Burke, the appellant in No. 682, in the United States

Circuit Court for the Southern District of California, Southern Division, against the appellees Southern Pacific Railroad Company (hereinafter called the Railroad Company) and Kern Trading and Oil Company and various other defendants, including Lamprecht and Aiken, appellants in No. 683, who filed a cross bill. The appellant Burke claims a one-tenth interest, and the appellants Lamprecht and Aiken the remaining nine-tenths interest, in certain sections of land as placer mining claims under mining locations said to have been made in 1909. The appellees claim the land in question under patent of the United States issued to the appellee Southern Pacific Railroad Company in 1894 under the Act of Congress of July 27, 1866 (14 Stats. 292) and Joint Resolution of June 28, 1870 (16 Stats. 382), granting lands to said appellee in aid of the construction of its railroad. Both the amended bill and cross bill pray that said Act and Joint Resolution be construed and that the appellees be estopped from claiming any right, title or interest in or to said lands. The Circuit Court, Ross, C. J., sustained demurrers to the amended bill and the cross bill for want of equity, upon the opinion in *Roberts vs. Southern Pacific Company*, 186 Fed. 934 (printed as Ap-

pendix "C" hereto), a like case decided at the same time. From a decree dismissing the amended bill and cross bill appeals were taken to the Circuit Court of Appeals for the Ninth Circuit. The latter Court has certified seven questions, which are hereinafter stated, to this Court under Section 239 of the Judicial Code.

The following facts appear in the statement certified by the Court below as being allegations of the amended bill and cross bill:

On July 10, 1894, a patent was issued to the Railroad Company purporting to convey 3200 acres of the lands granted to it by the aforesaid Act of Congress, including the lands in controversy. Said patent contained the following clause:

> "Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

Prior to July 9, 1892, the lands in suit were covered by valid subsisting mining locations theretofore made by divers citizens of the United States, pursuant to the mining laws, and after

discovery of mineral thereon.* The Railroad Company, with notice of these mining claims, falsely and corruptly caused one Madden, its land agent, to make, and he did make, on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent were a correct list of lands inuring to the Railroad Company under the aforesaid land grant, and that the lands were vacant, unappropriated, and not interdicted or reserved lands. No notice of said application for patent was given to any of the owners of the mining locations then existing, and no hearing was had in the Land Office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and said patent was issued to the Railroad Company without any such investigation or determination. The prior locators of said mining claims having failed to perform their annual labor for the year 1908, the appellant Burke and his associates entered on said lands in March, 1909, and exercising for-

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* NOTE: It does not appear that these claims were recorded in the local United States Land Office or were anything more than locations under local regulations of the State or mining district. Appellant Burke in his brief (pp. 23, 323) claims only that they were recorded with the recorder of the State mining district.

feiture by reason of such failure of the prior locators relocated the same in accordance with the mining laws of the United States after making due discovery of mineral upon the land covered by each location. Prior thereto said land had been designated by the Department of the Interior as lands bearing mineral, to wit, petroleum, in commercial quantities and more valuable for mining than for agricultural purposes.

The cross-bill contained an additional allegation, as follows :

> "These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and Joint Resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the

office of the Recorder of the County of Fresno and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said Act of Congress and Joint Resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part or any thereof."

The pertinent sections of the Act of July 27, 1866, and the full text of the Joint Resolution of June 28, 1870, are printed as Appendix "A" and Appendix "B," respectively, of this brief.

Criticism of Opposing Briefs.

Appellees petitioned this Court at the opening of the present term for a writ of certiorari directing the lower Court to certify to this Court for its consideration the entire record in these causes. This petition was opposed by appellant Burke, and was denied by the Court. Notwithstanding his own opposition to such petition and the Court's refusal to order up the whole record

for consideration, the appellant Burke has attached to his principal brief, as appendices, alleged copies of the amended bill of complaint, demurrer and patent (which are not included in the certificate before this Court), a deed given by the Railroad Company to a third party and the land office record underlying the patent in suit (neither of which constituted a part of the record in the court below), and throughout his various briefs refers indiscriminately to the certificate, the record below and the land office record of the patent proceedings, as well as to a multitude of supposed facts even more remotely removed from possible consideration by this Court.

The brief filed in behalf of the appellants Lamprecht and Aiken is also, although to a less extent, subject to criticism for its references to extraneous matters.

The brief filed by the United States as *amicus curiæ* is not based upon the certificate, or upon the record below, or upon any record except that which the Attorney General anticipates he may have the good fortune to make in a case against the Railroad Company in which he has just filed the bill of complaint in the United States District Court for the Southern District of Cali-

fornia. With the assurance of counsel for complainant, who has not yet even received the answer of his opponent, the Attorney General has inserted in his brief statement after statement, which he no doubt hopes to prove in the litigation which he has just commenced against the Railroad Company, but which the Railroad Company is equally certain are not facts and cannot be proved. If the appellees in this cause cannot in their presentation of the case go outside the facts stated in the certificate of the court below, it is not plain how an *amicus curiæ*, having no direct interest in the litigation, can be permitted in his brief to go outside of the certificate and outside of any record and allege in his brief, as established facts, statements as to which the appellees have had no day in court.

In 1892 the Railroad Company filed in the United States Land Office its application to patent the lands in question. After an examination pending in the Interior Department for a period of two years the patent was issued in 1894. Fifteen years later, in 1909, the appellants claimed the land as mineral, insisting that it did not pass by the patent of the United States issued as a result of the examination by the Interior Department. The appellants have no privity of

estate with the Government. The Railroad Company, having received a grant of land from the government upon certain conditions, having fully performed its part of the agreement, and having obtained a patent in fulfillment of the obligations of the United States, very properly resisted the claim. Notwithstanding these facts the brief of the United States on its last page contains the following:

> "Having prospered under the Nation's bounty, the railroad company now seeks to repudiate its solemn engagements, and claims that which was excluded from the operation of the grant and with its consent was excepted from the patents. This design will be resisted."

There would seem to be no occasion for this language. All that the appellees have done is to defend in good faith a patent issued to the Railroad Company by the Government eighteen years ago. The language of the Attorney-General is so uncalled for that the only possible explanation of it is that he is speaking of the bill of complaint filed by the United States against the Railroad Company, which presents other facts and an entirely

different aspect of the matter. In other words the brief of the Government has been filed, not for this case, but because of the pending litigation between the Railroad Company and the United States. This is borne out by the constant references in the brief to this new suit and the fact that the Government has attached to its brief a copy of the bill of complaint therein. The brief is filed in the hope of persuading the Court so to frame its opinion in the case at bar as to help, or at least not to hurt, the Government in its pending litigation. This is shown by the absolute refusal of the Government in any way to argue in its brief the sixth certified question which is vital to the case of the appellants. This is a virtual admission by the Government of the weakness of the position of the appellants and conclusively shows that the Government's brief was not filed with reference to the present controversy.

It is unparalleled in the whole history of judicial procedure for the Attorney-General of the United States to be permitted to intervene as *amicus curiæ* in a case between private litigants and then so to use the privilege granted him as to attempt to have decided issues not now before the Court, and which may or may not hereafter

come before it in a Government suit just begun against one of the parties to the case at bar. It is certainly unfair and unjust to the appellees to be compelled in this Court of last resort, not only to defend the present case, but also to defend another case arising upon entirely different facts, which has not proceeded beyond the filing of a bill of complaint. Especially is this so when the great seriousness and vast importance of this matter not only to the appellees but to all land grant railroads is considered. In this connection we desire to call the attention of the Court to an opinion rendered by the Attorney General to the Secretary of the Interior dated, March 29, 1911, in which he speaks with high approval of the decision of Judge Ross in the present case. This goes to show that his brief is not filed as a friend of the Court in this case, but as an aid to his own suit against the Railroad Company. We believe that this opinion of the Attorney General indicates his real judgment as to the present case better than his brief. It certainly is in accord with his predecessor in office at the time of the argument of the *Barden* case (154 U. S., 288), as appears by the brief of the Solicitor General, at page 296, *et seq.*, therein. As this opinion of the Attorney General has not

yet appeared among his printed opinions we print it here in full as Appendix "D" to this brief.

We have found it impossible within the reasonable limits of a brief to attempt to refer to the statements in opposing briefs of matters not justified by the record, or to discuss the authorities, upwards of 400 in number, cited by appellants. We shall, therefore, necessarily confine this brief strictly to the facts contained in the certificate and a discussion of the authorities which we consider pertinent, and we most earnestly urge that we shall not, by silence, be understood as conceding that any statements of fact in opposing briefs are founded upon the record, or as admitting the truth of any extraneous matters asserted therein or the accuracy of any interpretation placed by appellants upon any authorities cited by them.

ARGUMENT.

We believe that the convenience of the Court will best be served and brevity secured by discussing the case under two propositions which control the decision of the questions certified. A separate argument of each of the seven questions would involve unprofitable repetition. Separate reference to the various questions propounded by the lower Court (printed in full on pages 91 to 97 of this brief) is, therefore, postponed to a presentation of the two propositions which we believe sufficient for the disposition of the controversy.

POINT I.

The issue of a patent under this grant itself involves a determination by the Department of the Interior that the lands described therein are non-mineral lands and the presumption of such a determination is conclusive as against the appellants who are not in privity of estate with the Government.

By section 18 of the Act of July 27, 1866, 14 Statutes 292 (Appendix "A," p. 1), a grant

was made to the Southern Pacific Railroad Company to aid in the construction of its line. The grant as defined in Section 3 of that Act is a grant of "every alternate sec- "tion of public land, not mineral, designated "by odd numbers, to the amount of * * * "ten alternate sections of land per mile on "each side of said railroad whenever it passes "through any state, and whenever on the line "thereof the United States have full title, not re- "served, sold, granted, or otherwise appropriated, "and free from pre-emption or other claims or "rights, at the time the line of said road is des- "ignated by a plat thereof, filed in the office "of the Commissioner of the General Land "Office," with a proviso in the same section that "all mineral lands be, and the same are "hereby excluded from the operations of this "Act," and a further proviso that the word "mineral," as used in the Act, shall not be held to include iron or coal. Section 4 provided that, from time to time, whenever it should appear to the Commissioners appointed by the President of the United States that twenty-five consecutive miles of the railroad were completed in good, substantial and workmanlike manner, and as required by the Act, the Commissioners should so

report, under oath, to the President, and that patents should be issued to the Company "con-"firming to said Company the right and title "to said lands situated opposite to and co-termi-"nous with said completed section of said road."

A question having arisen whether the route designated by the Railroad Company in its map of definite location filed January 3, 1867, was authorized by its charter as it existed when the Act of 1866 was passed (*Southern Pacific Railroad Co. vs. United States*, 183 U. S. 519, 523), on June 28, 1870, a Joint Resolution, 16 Statutes 382 (Appendix B, p. iv), was passed and approved, which authorized the Railroad Company to construct its line on the route designated by the said map. This resolution also provided for the appointment of Commissioners by the President to examine each constructed section of railroad and declared that upon their report that such section had been constructed as required by law: "It shall be the duty of the "said Secretary of the Interior to cause patents "to be issued to said Company for the sections "of land co-terminous to each constructed "section reported on as aforesaid, to the extent "and amount granted to said Company by the "said Act of July 27, 1866, expressly saving

" and reserving all the rights of actual settlers, " together with the other conditions and re- " strictions provided for in the third section of " said Act."

The full text of the patent issued to the Railroad Company on July 10, 1894, is not included in the statement of facts certified to this Court. It appears in the certificate merely that on said date a patent purporting to convey certain lands so granted by Congress, including the lands in controversy herein, was issued from the United States to the Railroad Company and that the patent contained the clause hereinbefore quoted purporting to except and reserve mineral lands, other than coal and iron lands, should any such be found.

The effect of the issuance of the patent will first be considered irrespective of the mineral reservation clause included therein, since appellants deny that *any* patent issued under this grant could be effective to convey mineral lands.

1.

In the administration of the public land laws generally it has long been settled that the issue of a patent by the Department of the Interior, under an Act of Congress providing for the dis-

posal and patenting of public lands, is an official determination and declaration by the Department that the land so patented is of the character subject to disposition under such Act and that all statutory requirements preliminary to its issue have been complied with; and that this determination is conclusive except in a direct proceeding for its annulment or limitation brought by the Government or its privies.

In *Polk's Lessee vs. Wendal et al.*, 9 Cranch 87, Mr. Chief Justice MARSHALL said, at page 98:

> "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all the proceedings are completed by a patent issued by the authority of the State, a compliance with these rules is presupposed. That every prerequisite has been performed, is an inference properly deducible and which every man has a right to draw from the existence of the grant itself."

In *Steel vs. Smelting Company*, 106 U. S. 447, an action to recover possession of land de-

rived from the Government under a mineral patent, the defendant asserting that the land was non-mineral and attacking the patent by charges of fraud, bribery and perjury, Mr. Justice FIELD said, at page 450:

> " We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been

the uniform language of this court in repeated decisions."

In *Smelting Co. vs. Kemp*, 104 U. S. 636, also an action for the recovery of land derived from the United States under a mineral land patent, the defendant introducing in evidence the record of proceedings in the Land Office, by which the said patent was obtained for the purpose of impeaching its validity, it was held that the admission of this record was erroneous, and the opinion of the Court, written by Mr. Justice FIELD, contains the following, at page 640:

> "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with."

And at page 647:

> "If in issuing a patent its officers took mistaken views of the law, or drew errone-

ous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands (*Boggs v. Merced Mining Co.*, 14 Cal. 279, 363). It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

See, also,

French vs. Fyan, 93 U. S. 169, 171.
Lee vs. Johnson, 116 U. S. 48, 49.
Johnson vs. Towsley, 13 Wall. 72, 83.
Bohall vs. Dilla, 114 U. S. 47, 50.
Duluth & Iron Range R. Co. vs. Roy, 173 U. S. 587, 590.

It is unnecessary to multiply citations and quotations. Appellants do not deny the general

proposition and appear to admit its application under all land grants except those of which a railroad company, particularly the Southern Pacific Railroad Company, is beneficiary.

2.

The foregoing proposition as to the presumptions inherent in a patent, concerning the character of the land and other prerequisites of its issue, are fully applicable in the case of patents issued under the Southern Pacific Railroad grant, and parties not in privity with the Government are not entitled to attack such a patent upon allegations that there was no investigation or determination by the Department as to the character of the land or that the land was in fact mineral land.

It is argued in all the opposing briefs that there is a distinction between patents issued under special or direct grants, like the railroad land grants, and those issued under general public land laws which denies to the former class of patents the application of the presumptions of regularity attending patents of the latter class. There is no authority which sustains this assertion. It is admitted, however, that if the Department of the Interior had actually decided that the lands were non-mineral appellants would

have no right to show the decision erroneous (Brief for appellants Lamprecht and Aiken, p. 91; principal brief for appellant Burke, p. 95). It seems to us that this admission destroys the argument, for if an actual decision by the Department as to the character of the land is conclusive it must be because the Department has jurisdiction to decide the question of fact as a preliminary to the issue of patent, and in that event its patent necessarily implies that the fact has been decided. But whatever may be the effect of this admission by the appellants, there is no distinction between general grants and direct grants which affects the present question. The two classes of grants necessarily differ in many particulars, but there is at least one particular in which they do not differ in the slightest degree, and that is in respect of the duty and authority of the Department of the Interior to ascertain the character of the land before the issue of the patent and the consequent conclusive presumption of such ascertainment attending the issue of the patent. The homestead law, for example, provides that persons having certain qualifications "shall be entitled to enter" a specified quantity of unappropriated public land and im-

poses various requirements as to occupation, cultivation, etc., and then provides that upon compliance with the various requirements the entryman "shall be entitled to a patent" (R. S., Secs. 2289 to 2291). One of the conditions attaching to the homestead law is the provision of Section 2302: "nor shall any mineral lands be liable to entry and settlement under its [this chapter's] provisions." We do not find in the homestead law any specific grant of authority to the Department of the Interior to determine the non-mineral character of the land entered for homestead, and the reservation of mineral land from homestead entry and settlement seems to be as absolute as the reservation contained in the Southern Pacific Railroad grant. Yet it is conceded that it is the duty of the Department in the administration of the homestead law to adjudicate the character of the land and that its patent when issued conclusively establishes, as against colleral attack, that the land has been found to be non-mineral. It is true that the railroad grant is a grant *in praesenti* to a grantee specifically named, while the homestead law is a general offer to dispose of lands to a specified class of persons who desire to avail themselves of its benefit and who comply with its conditions.

But the rights of the homestead entryman are not derived from the Department of the Interior, or from its patent, but are derived from the statute as fully as the rights of the railroad grantee. "Where the right to a "patent has once become vested in a pur- "chaser of public lands, it is equivalent, so far "as the Government is concerned, to a patent "actually issued. The execution and delivery of "the patent after the right to it has become com- "plete are the mere ministerial acts of the officers "charged with that duty" (*Simmons vs. Wagner*, 101 U. S., 260, 261). The Act of 1866 does not in express terms direct the Secretary of the Interior to adjudicate the character of the land, but it directs the issue of patents for the lands granted, as the same shall be earned by the construction of the railroad, and a compliance with the direction to issue patents necessarily involves an identification of the lands defined by the grant, including, as fully as in the homestead law, a determination that the lands are non-mineral. The administration of the grant, without express direction to that effect, falls to the Department of the Interior (*Bishop of Nesqually vs. Gibbon*, 158 U. S., 155, 167). And in any event the Joint Resolution of June 28, 1870,

specifically named the Secretary of the Interior as the officer charged with the duty of issuing the patents. It is unnecessary to extend this brief by references to other general land laws, for the purpose of arguing as an original proposition the complete analogy between those laws and the railroad land grants in respect of the jurisdiction of the Department of the Interior to adjudicate the character of the land.

This Court has expressed most clearly in the majority opinion in *Barden vs. Northern Pacific Railroad Company*, 154 U. S. 288, its view that the general rules above stated as to the effect of patents apply to patents issued under the land grant to the Northern Pacific Railroad Company, which was a grant differing in no material particular in substance or language from the grant to the Southern Pacific Railroad Company. That case was an action by the Northern Pacific Railroad Company for the possession of certain parcels of land within its granted limits, this possessory right being asserted in advance of the issuance of a patent, the application therefor being pending with the Secretary of the Interior. The grant excepted mineral lands in terms identical with the exception in the Southern Pacific land

grant. It was admitted that the land had been discovered to be mineral, and that various persons, including the defendants, had filed mineral locations thereon, but the Company, nevertheless, claimed the right to recover this land because of the alleged fact that the land was not known to be mineral either at the time its map of definite location was filed or at the time it had filed its selections of these lands and application for the patent thereof. This Court overruled that contention, and held that the Company was not entitled to the possession of the land in view of its then known mineral character. It was argued, in behalf of the Company, that unless the mineral exception in the grant were limited to land known to be mineral at the time the grant took effect by the filing of the map of definite location, the title to the lands, even after patent, could be defeated by proof that the land was in fact mineral. In answer to this contention the majority opinion, written by Mr. Justice FIELD, says, in part, at page 321:

> "The determination of the character of the land granted by Congress, in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the Land Department, whose action is sub-

ject to the revision of the Commissioner of the General Land Office, and on appeal from him by the Secretary of the Interior. Under their direction and supervision the actual character of the land may be determined and fully established."

And, at pages 328, 329:

"If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent."

And, at page 329:

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy

whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

And at pages 330, 331:

"The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

Three Justices dissented, believing that the character of the land should be determined as of the time of definite location of the railroad, but nothing in the dissenting opinion indicates any disagreement with the views expressed by the majority that the issue of a patent would be conclusive as to the non-mineral character of the land. It is worthy of note also that the brief of the Solicitor General asserted the propositions that the titles of the company would not be left forever uncertain; that the Act contemplated that the Secretary of the Interior should determine the character of the land, and that after he has decided that the lands are not mineral, even if they are in fact mineral, and has issued a patent therefor, the title would not be liable to be defeated by the subsequent discovery of minerals (see abstract of brief at page 296), thus advancing the very propositions which were adopted in the majority opinion.

It is asserted by appellants that the *Barden* case holds that, by virtue of the absolute exclusion of mineral lands from the railroad land grant, title to lands which are in fact mineral can never pass under the grant. That such was not the holding of the Court is made perfectly clear by the comment upon that decision which

occurs in the opinion in *Shaw vs. Kellogg*, 170 U. S., 312, at 339, as follows:

> "Defendant relies largely on the decision of this court in Barden v. Northern Pacific Railroad, 154 U. S., 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or

non-mineral was open to consideration up to the time of issuing a patent. *But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals.*"

There is no room for doubt that the Court in the *Barden* case announced the view that, notwithstanding the mineral exception in the railroad land grant acts, it is within the jurisdiction of the Department of the Interior to determine the mineral or agricultural character of the land prior to the issue of a patent, and deliberately applied to railroad land grant patents the principle established under general land laws that the issue of the patent itself presumes, conclusively against collateral attack, an antecedent determination that the land was nonmineral. Since the determination so presumed is conclusive against those who are not in privity with the Government, it is not open to them to impeach the patent by alleging either that the Department made no determination as to the character of the land or that the land was in fact mineral land at the time of the issue of patent.

The gist of the rules announced in the various

cases on this subject might, we think, be accurately stated to be that the Secretary of the Interior is the agent of the Government, appointed and empowered to execute deeds to lands which are specified in general terms in the statute which constitutes his power of attorney. If, as such agent, he conveys, through fraud or mistake, lands which are within the general limits of his authority, but which for some reason were not in fact lands of the character which he was authorized to convey, his principal, the Government, may have the conveyance set aside by a court of equity. But, if the principal does not see fit to complain, or some one who had acquired from the principal a title, legal or equitable, prior to that created by the agent's fraudulent or mistaken conveyance, there is no one entitled to complain. The conveyance of the legal title being allowed by the principal, and all in privity with him, to stand, no title or right to the property can subsequently be acquired through the principal which will overcome the agent's conveyance, for every such right or title will be subsequent, and therefore subject, to the prior conveyance of the legal title.

To escape the effect of these propositions, the appellants profess to find in certain portions of the

opinion of Mr. Justice FIELD in the *Barden* case, authority for the proposition that there must be an *actual* investigation and determination by the Department as to the non-mineral character of the land, and an affirmative statement of such finding in the patent, and they conclude that, in the absence of such an affirmative finding and recital, the patent carries no presumption of the determination of that question, and that a subsequent mineral locator is entitled to set aside the patent by proof that the land was known to be mineral at the time it was issued. The Court did not decide or express any such proposition in the *Barden* case. The issue before the Court was merely whether the fact that the land was not known to be mineral at the time the railroad was definitely located, or at the time of filing the list of selections for patent, would definitely fix the non-mineral character of the land and warrant the issue of the patent, even if the mineral character was discovered thereafter. This was the only issue decided. But, in order to show that the result of the decision rendered on the point at issue would not forever leave in uncertainty and jeopardy the title to the land, the majority opinion indulged in the discussion of the conclusiveness of a patent, from which the above

quotations are made, and from some portions of which discussion the appellants seek to derive comfort. While the discussion of this subject was undoubtedly *obiter*, it was made with deliberation and for the purpose of destroying the principal argument against the correctness of the decision rendered, and the discussion is, therefore, entitled practically to the weight of an actual decision. The opinion undoubtedly does state that the Secretary of the Interior may make an investigation and determination as to mineral character, which he is, of course, supposed to make under the statute, and that the fact of such determination may be recited in the patent. But Mr. Justice FIELD certainly did not state or intend to state that, in the absence of an actual determination, or of an affirmative recital of such determination, a patent issued would not be entitled to the presumption, always accorded to such instruments, of the existence of all the prerequisites of its issue.

On the contrary, he says in that opinion, at page 330:

> "It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without

> fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

The appellants, we think, overlook the fact that Mr. Justice FIELD had in mind and was describing a procedure by which the patent could be made proof against attack by the Government, as well as proof against collateral attack by a stranger. He expressly states, at page 331, that a patent issued after due examination of the subject by the officers of the Department and a judgment rendered by them that the lands were non-mineral would estop *the Government* from contending to the contrary.

Furthermore, this argument is not available to appellants, for the patent in suit has not been embodied in the certificate before this Court and the facts certified do not show whether or not the patent recited that the land was agricultural.

Appellants further attempt to support their proposition by reference to the rule that the jurisdiction of courts of limited and special jurisdiction must affirmatively appear upon their judgments and records or they are nullities, and it

is argued that the Department of the Interior is a tribunal of special and limited jurisdiction; that a decision that the land patented was non-mineral is necessary to the jurisdiction of the Department to issue a patent, and that, therefore, unless it affirmatively appears by the patent that such finding was made, the patent is void. *This argument also encounters the difficulty above mentioned that the terms of the patent in this case are not before the Court.* The appellants are, however, mistaken both as to the nature of the rule and as to its applicability to the Interior Department. While the Interior Department has frequently been described as a special tribunal, or as a quasi-judicial tribunal, the facts remain that it is, in respect of the issue of patents, a purely administrative body, and that its act in issuing a patent is a mere ministerial function. There is certainly nothing about the railroad land grants which renders the exercise of the functions of the Department with reference to them any more judicial than the functions which the Department is called upon to exercise under most public land grants, but the contrary rather, and yet it has never been suggested under land laws generally that every fact which the Department is

required to determine prior to the issue of a patent must be affirmatively stated in the patent. We do not understand that the rule frequently announced to the effect that the issue of a patent presupposes the existence of all prerequisites to its issuance is derived in any sense from any supposed judicial character of the duty performed by the Department. The same presumption is indulged in the case of a conveyance by an agent acting under a power of attorney for an individual principal, *Clements vs. Machebœuf*, 92 U. S. 418, at page 425. And, while a person taking such a conveyance from an agent is not protected as against the principal unless the agent was acting within the scope of his authority, there has never been any rule of law requiring that such authority should be spread upon the instrument of conveyance. But, even if it be assumed that the Interior Department in these cases is a strictly judicial tribunal exercising limited and special jurisdiction, the rule cited by the appellants would not require affirmative proof of the determination of the non-mineral character of the land, or the affirmative statement in the patent that such a determination had been made. The rule relates to jurisdiction only. The rule in substance is that a

person seeking the benefit of the judgment of a court of special and limited jurisdiction must show that the court had jurisdiction of the subject matter and of the parties, and that this must affirmatively appear either *by evidence* or by proper averment in the record of the court, there being no presumption of law in favor of the jurisdiction of such a court. But it is not necessary that the facts establishing jurisdiction shall be recited in the judgment, or, even that they shall appear in any part of the record of the proceeding. If jurisdiction actually existed, proof thereof may be given extraneously (*Galpin vs. Page*, 18 Wall. 350, at page 366; *Van Deusen vs. Sweet*, 51 N. Y. 378, at page 385). And it is the rule in the case of inferior courts of special and limited jurisdiction, as well as in the case of superior courts of general jurisdiction, that "whenever it appears that a court possessing judicial powers, has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceeding for that purpose" (*Harvey vs. Tyler*, 2 Wall. 328, at page 342). In granting the patent in suit the Department clearly had jurisdiction of the subject matter, for

such jurisdiction was conferred by the Act of Congress and by the Joint Resolution. These were admittedly public lands, and the Department was authorized to convey them if they were ascertained to be non-mineral lands as to which the United States had full title, free from pre-emption or other claims or rights, etc. The subject matter, therefore, was within the jurisdiction of the Department, and no question of jurisdiction of parties was involved. The identification of the land as non-mineral, or as free from pre-emption and other claim, and as within the twenty-mile limits of the grant, etc., were matters of fact necessarily presented for determination as incidental to the issuance of the patent, which represents the final judgment of the Department. These matters of fact would not present questions of jurisdiction. They are analogous to the facts which the plaintiff must prove in any action to establish his cause of action and entitle him to a judgment. If a court having jurisdiction of the subject matter and of the parties renders a judgment in the absence of proof of some fact essential to the cause of action, the judgment is erroneous and subject to correction upon appeal or by other direct attack by the proper procedure; but, if not so corrected, it is

absolutely conclusive, not only as against strangers to the litigation, but also as against the parties thereto. And so, if we erroneously assume that the Interior Department is a judicial body and subject to the rule invoked by the appellants, its failure to investigate the character of the land or its erroneous determination that the land was non-mineral would not impair the conclusive force and effect of the patent, except in a direct proceeding by the Government, or a party in privity with the Government, to set aside or correct the patent.

Much is said in the brief of appellant Burke as to the necessity of *some* evidence of non-mineral character to sustain a patent, which is an erroneous contention, for, as the Court said in *De Cambra vs. Rogers*, 189 U. S., 119, 122:

> "It is hardly necessary to say that, when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

Appellant is obliged by the authorities to admit (pp. 86, 124) that if there were even some perjured testimony, and nothing else, securing a

decision of the department through fraud, the patent would convey the legal title and could be cancelled only in a direct suit by the Government. As the certificate shows that the bill of complaint and cross-bill alleged that Madden, the land agent of the Railroad Company, made a false and fraudulent affidavit, in the application for this patent, to the effect that the lands were, *inter alia*, "not interdicted mineral or reserved lands," which allegation would ordinarily be deemed to disclose some evidence, the appellant, with characteristic ingenuity, discards this allegation from the case by the explanation that it "is not under consideration here," but that the allegation was made with reference to a question whether the lands were co-terminous to a completed twenty-five mile section of road.

3.

Appellants are not in privity with the Government and have therefore no standing to attack this patent. The allegations of the existence of mineral locations prior to patent do not affect the question.

All allegations as to the manner in which the patent was issued, and as to matters antecedent

to its issue, are immaterial. As to all the world, except the Government and its privies, as we have seen, the patent is conclusive. The rule is believed to be that a demurrer does not admit immaterial allegations, but it will be assumed for the purpose of the argument that all the allegations of the pleadings, as certified by the court below, are admitted by the demurrer.

The appellants' claims rest solely upon their so-called mineral locations made in March, 1909. The only information given concerning these so-called locations is that the appellants allege themselves to be the owners and entitled to the possession of certain described sections of land as placer mining claims under the mining laws of the United States, and that by reason of the failure of certain alleged prior locators of mining claims on this property to perform their annual labor for the year 1908, the appellants entered on said lands in March, 1909, and, exercising forfeiture by reason of such failure, relocated the same in accordance with the mining laws of the United States after making due discovery of mineral upon the land covered by each location. It is further alleged that the prior locations so forfeited and re-located by the appellants were made prior to July 9,

1892, and were on that date valid, subsisting mining locations. Section 2324 of the Revised Statutes provides for certain annual labor to be performed upon mining claims until the issue of patent, and that upon the failure to comply with these conditions the claim upon which such failure occurred "shall be open to relocation in the same manner as if no location of the same had ever been made." If it be assumed that the re-locations which the appellants claim to have made upon the forfeiture of the prior locators were in all respects made as required by law, nevertheless, the appellants acquired no priority by reason of the original locations made before the issue of the patent. Under the statute and by its express terms the relocation is an independent act and initiates a new title which dates only from the time of the re-location. The statute does not provide for any succession or privity of estate between the original locators and the relocator.

In *Lavagnino vs. Uhlig*, 198 U. S. 443, at page 452, this Court said :

> "It is elementary also that the power conferred by Section 2324 of the Revised

> Statutes, to re-locate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location."

Determining, therefore, the standing of the appellants as of the date of their alleged re-location, no entries or acts which they could then make or perform, could give them any right of possession or equitable interest in the land, for at the time the entire title had been conveyed to and vested in the Railroad Company. The land was not public land or open to entry for any purpose under any of the public land laws in March, 1909. It follows that so far from being in privity with the Government, the appellants are merely in the position of trespassers presuming to attack the patent issued fifteen years before their trespass began, basing their attack upon alleged irregularities committed in the proceeding in the Land Department to which they were not parties and in which they had no concern.

Any suit of the Government to vacate or annul the patent was barred by limitation in 1901 by the Act of March 2, 1896 (29 Stats. 42). This consideration emphasizes the extraordinary nature of the appellants' claims in that they seek

to establish an alleged right, which could be derived only from the Government, more than ten years after the Government had lost all opportunity to claim any rights in the premises.

The allegations as to the existence of mineral locations, made by prior locators, on July 9, 1892, when the Railroad Company filed its list of the granted lands to which it believed itself entitled and applied for patent thereof, serves no purpose except as an evidentiary allegation on an issue of the mineral character of the land, which issue is concluded by the issuance of the patent. The definite location of the railroad line was made on January 3, 1867, as shown by the Joint Resolution, Appendix "B," p. IV., and it does not appear that there were at that time any existing mineral locations which would operate to segregate the land from the public domain. The appellants are mistaken in thinking that the existence of mineral locations was important or given any consideration in the *Barden* case. The land there involved was admittedly mineral and the fact of the locations was of no additional importance except as the source of the defendant's claim to the right of possession.

It was held in *Northern Pacific Railroad Company vs. Sanders*, 166 U. S. 620, that a min-

ing claim existing *of record in the United States land office* at the time of filing of the map of definite location was a "claim" within the meaning of the granting act which operated to segregate the land subject to such location from the public domain and exclude it from the grant. But this was decided in a case in which the Railroad Company sought to recover upon such title as it possessed prior to the issue of a patent so that the question of the conclusiveness of the patent upon the subject of pre-existing claims and upon the subject of the character of the land was not presented. The *Sanders* case is further distinguishable from the present case in that the whole point of that decision was the pendency of these claims of record in the federal land office at the time of the definite location of the railroad, while in the present case the appellants have not alleged that the prior mineral locations on which they largely base their case existed at the time of definite location. In the *Sanders* case it appeared that the mineral locators not only had filed upon the land according to the laws of the Territory of Montana and the mining usages and customs then in force in the local mining district, but also had made a

filing of the land as mineral in the United States local land office and applied for patent therefor (166 U. S. at p. 624). The mining laws of the United States declare all mineral deposits in the public lands free and open to exploration and purchase by citizens (R. S., Sec. 2319). Locations which have not advanced beyond the possessory right acquired through compliance with local laws and regulations (R. S., Sec. 2322), are not required to be recorded in any federal land office, although they may sometimes be recorded in some State office under local laws or mining regulations (R. S., Sec. 2324). Application for patent may be filed, with proper proofs, in the local United States land office (R. S., Sec. 2325). Unless and until such filing occurs in the federal land office, the federal authorities have no record of the location and no information thereof except such as an actual examination of the land by some agent of the government may have disclosed. It is not pretended that there was any record in the federal land office of the mineral locations alleged to have existed prior to the patent in suit. The only material inquiry as to matters intervening between the date of the definite location of the railroad and the date of the issue of patent

is whether the land is in fact mineral; the fact that some one has located an experimental claim thereon is unimportant. Hence we reiterate that the allegations as to prior locations are merely evidentiary and that the issue of the patent renders the evidence immaterial.

POINT II.

The mineral land reservation clause in the patent is ineffective for any purpose.

Appellants argue that, even if the presumptions usually attending the issue of a patent are applicable, contrary to their first contention, to patents issued under a railroad land grant, the mineral land reservation clause contained in the patent in suit operates, upon divers theories advanced, to destroy the operation and effect which the patent would otherwise have. We contend that the patent has precisely the same force and effect as if this reservation clause were not inserted therein, and that this proposition has been definitely established by this Court.

The reservation clause is as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

1.

This reservation clause is not an assertion that the Department believed that any of the lands conveyed were mineral, and it does not repel the inference and presumption ordinarily inherent in a patent that the Department had made an investigation and determined that the land was non-mineral.

The theory is advanced by appellants that this clause is either a declaration by the Department that it believes some of the lands patented are mineral or a declaration that it has made no investigation or determination as to the character of the land.

This clause does not, upon a fair construction of its language, indicate any intention to exclude or vary the usual presumptions resulting from the issue of a patent. On the contrary, it is inconsistent with any view that the Department believed the land was mineral. The language

used expresses only futurity and possibility, and suggests no idea except a desire to reserve the benefit of chance discoveries in the future. The words "should any such be found" certainly do not mean "which have been found". A desire to reserve, if possible, mineral lands which might subsequently be discovered is entirely consistent with a previous investigation by the Department resulting in a *bona fide* belief and determination that none of the lands were mineral. Some light upon the purpose of this clause in line with the foregoing suggestion is shed by a report of the Land Commissioner quoted in *Merrill vs. Dixon*, 15 Nev., 401 (decided in 1880), at page 405, quoting from 2 Lester's Land Laws, page 337, as follows:

> "In every case reported from the district land officers, of selections made under the acts of 1862 and 1864, for the Pacific railroad, the agent of the company, in the first instance, is required to state in his affidavit that the selections are not interdicted, mineral, or reserved lands, and are of the character contemplated by the grant. Upon the filing of lists, with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections

in the particulars mentioned, and in other respects. They subsequently undergo scrutiny at this office, are tested by our plats, and by all the data on our files, sufficient time elapsing, after the selections are made, for the presentation of any objections to the department, before final action is taken; and to more effectually guard the matter, there is inserted in all patents issued to said railroad company a clause to the following effect: 'Yet, excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal and iron land.'"

It is evident that the original purpose of this clause was to reserve to the Government the benefit of future mineral discoveries regardless of the thoroughness with which the character of the land had been investigated by the Department in any particular case. But whether or not this was the original design, the insertion of the clause had become in 1894, when the patent in suit was issued, merely a habit. It is conceded in all opposing briefs that from the beginning of the administration of the railroad land grants reservation clauses of substantially this

language were inserted in all railroad patents and that this practice continued until 1903, when the clause was ordered eliminated from all future railroad patents by Secretary Hitchcock (32 Land Decisions, 342). The very uniformity of the practice conclusively shows that the clause was not intended as a declaration that the character of the land had not been investigated and adjudicated to the best of the Department's ability. The Department itself would hardly countenance, and has never advanced, such an explanation of the practice, one having the necessary effect of convicting the Department of deliberate violation of duty in every railroad land grant case which received its consideration.

There is nothing, therefore, in the clause itself which tends to overcome the presumption arising from the issue of the patent that the character of the land had been investigated, and that the Department had determined it to be non-mineral. But, even if the contrary construction of the language were admissible, the clause would still be ineffective to reserve mineral lands, then known or then unknown, from the operation of the patent because of the inherent nullity of the clause, discussed under the next subdivision.

2.

The insertion of this clause in the patent was absolutely unauthorized and it is null and void for all purposes.

It was the statutory duty of the officers of the Department as agents of the Government to issue patents conveying, immediately upon their identification, the lands granted by Congress. The language of Section 4 of the Act of 1866 is that after the Commissioners have reported as to the construction of the road "patents of lands, as aforesaid, shall "be issued to said Company, confirming to said "Company the right and title to said lands" and that upon the reports of the Commissioners, from time to time, that additional sections had been constructed, "then patents shall be issued "to said Company conveying the additional sec- "tions of land as aforesaid and so on as fast as "every twenty-five miles of said road is com- "pleted as aforesaid." The language of the Joint Resolution of 1870 is that upon the report of the Commissioners "it shall be the duty of the "said Secretary of the Interior to cause patents "to be issued to said Company for the sections "of land coterminous to each constructed section

"reported on as aforesaid," etc. This was no discretionary agency. The terms of the conveyance and the nature of the title to be conveyed were not left to the whim of the Department. This is emphasized by a consideration in detail of the matters imposed by the statute upon the land department in the administration of this grant, from which it appears that the functions of the Department under this grant are much more limited than in the administration of a general law, like the homestead or pre-emption laws, under which in any case a multitude of questions of fact susceptible of contest as well as numerous questions of law may be presented. The sole duty of the Department under this grant consists of the issuance of patents. The performance of this duty is necessarily dependent upon the ascertainment of a number of facts, all of which are incidental to an identification of the land granted. These facts are, (1) that the land was a part of the public domain; (2) that the sections were designated by odd numbers; (3) that they were within the granted twenty mile limits; (4) that they were not mineral; (5) that they had not been reserved, sold, granted, or otherwise appropriated and were free from pre-emption or other claims

or rights at the time of filing the map of definite location; (6) that the commissioners provided for by Section 4 and by the Joint Resolution had certified as to the completion of a twenty-five mile section of road; (7) that they were situated opposite to and coterminous with a twenty-five mile completed section of the road as certified by the commissioners. The foregoing enumeration is believed to include everything necessary for the determination of the Interior Department prior to the issuance of a patent, and it is plain that the function of the Department under the Act was the purely ministerial one of identifying the sections of land embraced within the grant as defined by Congress. There was no authority to add anything to or take anything from the conveyance directed by Congress. There was no authority to insert in a patent any other terms than those of conveyance and any appropriate recitals, and the title to be conveyed upon the identification of any particular sections within the grant was the whole title. This duty could not be enlarged or diminished by the Department at its pleasure. It might neglect the performance of the duty enjoined and refrain from acting at all, but, in the event that it did exercise the power which it

was directed to exercise, it could not by the insertion of any conditions or exceptions either evade the responsibility of passing upon the prerequisites of the exercise of its power, or create or reserve to the Government any reversionary interest to take effect upon the happening of future contingencies. The fact of the issuance of the patent conclusively imports, as we have stated, that the Department has identified the land as being within the twenty mile limits, as unappropriated, unsold, unreserved, ungranted, as free from pre-emption or other claims or rights, and as non-mineral. If the Department could insert in the patent an exception covering the mineral character of the land, it could embrace in such exception also all of the other matters which it was bound to decide, and the absurdity of the suggestion of the existence of any such authority or power is obvious.

The invalidity of this clause has been established by three decisions of this Court, and by decisions of the Circuit Court, and of the Land Department itself.

The ineffectiveness of the clause seems to have been first decided by Secretary LAMAR in the *Matter of Spong*, 5 Land Decisions, 193, decided in 1886. This case arose under the land grant

to the Central Pacific Railroad Company, which was a grant similar to the Southern Pacific Railroad grant. A patent had been issued for certain land to the Central Pacific Railroad Company in 1867 containing a mineral reservation clause excepting "all mineral lands, should any such be found to exist in the tracts described in the foregoing." Spong claimed to have found a gold lode on land covered by the patent, and that a placer mine had existed and been operated on the property before the land grant attached, and made application to purchase the land located by him as mineral. His application was denied, notwithstanding the exception in the patent, the Secretary saying:

> "While the exception of mineral lands from the grant is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands which may after the lapse of an indefinite number of years prove to be agricultural in character."

The same facts were thereafter presented in the case of *Cowell vs. Lammers*, 21 Fed. 200, in the U. S. Circuit Court, California District, SAWYER, C. J. The grantee of the Central Pa-

cific Railroad Company brought a suit in equity, to establish his title and right of possession against the defendants, claiming the discovery and right to develop the gold lode. It was held that the defendants were trespassers, that the land was not subject to location as a mining claim, and that the patent, notwithstanding its reservation clause, was conclusive against the collateral attack of the defendants. Judge SAWYER'S opinion is exhaustive and forceful. He said, in part, at page 205:

> "There is no express authority in the statute to issue a patent covering known mineral lands at all and no more authority to insert a clause in a patent issued, excepting or excluding therefrom, generally and indefinitely, without describing them so as to identify the exceptions made by the patent, 'mineral lands,' should any be found to exist in the tracts described. There is just as little authority for one as the other; as little authority for inserting the clause of exclusion, as for issuing any patent at all embracing mineral lands. Under the statute, it is as clearly the duty of the officers authorized to issue patents to the railroad companies to ascertain whether the lands patented are embraced in the congressional grant and

patentable, or are mineral lands and not patentable, as it is in the case of a pre-emption, homestead or other entry and sale of public lands, to ascertain the facts authorizing the issue of the patent."

And at page 206, 207:

"The lands are either patentable under the act or they are not. If patentable, the issue of a patent is authorized. If not patentable, it is unauthorized, and the issue of a patent is, clearly, as conclusive evidence of the determination of the fact of patentability, upon a collateral attack, in the one case as in the other. Suppose it should afterwards turn out that all is mineral land. The exception would be as broad as the grant, and be void as an exception. . . . If land which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States 15 years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee

or his grantees can rest in security, would be but a delusion and a snare. Congress could never have contemplated such a construction and execution of the acts in question."

And at page 208:

"There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not. The most that can be said, then, is that the clause of exception and exclusion in the patent in no way affects the rights of the parties given by the statute, in no way enlarges or restricts those rights" * * *.

Appellants attempt to dispose of this decision of Judge SAWYER by showing that Judge SAWYER committed himself in subsequent decisions to the proposition that the railroad land grants excluded only mineral lands known to be such at the date of the definite location of the railroad, which view was subsequently rejected by this Court in the

Barden case. But the reasoning of the Court in *Cowell vs. Lammers* as to the validity of the mineral land reservation in the patent is not dependent upon or involved in any way with the question decided in the *Barden* case, which concerned the right of the railroad grantee before the issue of patent to recover the possession of land concededly mineral. It is not apparent that the soundness of the reasoning of a judge upon one question of law should be deemed impaired by the fact that upon a different question of law his view has not been sustained by this Court.

In *Davis's Administrator vs. Weibbold*, 139 U. S., 507, Mr. Justice FIELD writing the unanimous opinion of the Court, expressly approved the decision of Judge SAWYER in *Cowell vs. Lammers* (*supra*),. This case, also, contains an actual decision by this Court of the principle involved in the attempted reservation and a determination against the validity of the clause. The case involved an action for possession of a quartz lode. The plaintiff had a mineral patent, issued in 1880, upon an entry made in 1878. The defendant claimed under a townsite patent issued in 1877. A decision in favor of the plaintiff was reversed and the case remanded for a new

trial because of errors in the exclusion of evidence offered by the defendant. It appeared that the plaintiff's mineral patent contained an exception clause, "excluding, however, from these presents "all town property rights upon the surface, and "there are expressly excepted and excluded "from the same all houses, buildings, structures, "lots, blocks, streets, alleys, or other municipal "improvements on the surface of the above de- "scribed premises not belonging to the grantee "herein and all rights necessary or proper to "the occupation, possession and enjoyment of "the same." Upon the question whether the patent should have been excluded when offered in evidence, because it excepted the rights claimed by defendant and therefore did not establish plaintiff's title, the Court said, at pages 527, 528:

> "But we do not attach any importance to the exception, for the officers of the Land Department, being merely agents of the Government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge

their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers."

In *Deffeback vs. Hawke*, 115 U. S., 392, the case was a suit by a patentee of a placer mining claim to recover possession. After his filing under the mining laws, which subsequently ripened into patent, a townsite was platted under the Federal laws. The defendant claimed under the townsite proceedings. In those proceedings the General Land Office had held a hearing as to the mineral character of the land and had decided the issue in favor of the plaintiff and issued the patent to him. The defendant claiming title to his improvements continued his occupation, notwithstanding this decision. The real question in the case arose upon defendant's contention that the patent to the plaintiff should have excepted and reserved the buildings and other improvements placed upon the land by the defendant or his predecessors. This Court held that this con-

tention had no support in any legislation of Congress and said, at page 406:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface."

It is true that in his opinion in the *Barden* case Mr. Justice FIELD pointed out that the townsite laws involved in *Deffeback vs. Hawke* and *Davis vs. Weibbold*, differed from the railroad land grants to such an extent that not all the reasoning of the opinions in those cases was applicable to a case under a railroad grant, but in the same connection, speaking particularly of the decision in *Davis vs. Weibbold*, Mr. Justice FIELD said in the *Barden* case, 154 U. S., at page 324:

> "Yet the effect given to the townsite patent will be found not inconsistent with the views hereafter expressed in the present case."

And in any event the differences between the townsite law and the railroad land grants, to which Mr. Justice FIELD adverted, does not affect the views expressed by this Court, as above quoted, in the two townsite cases concerning the want of authority in agents of the government to insert exceptions and reservations in the patents issued by them.

The same question was again presented to this Court for decision in *Shaw vs. Kellogg*, 170 U. S. 312. This was an ejectment action to recover a section of land in the so-called Baca grant No. 4, which included certain mineral bearing property designated as the Eastern Star Mine and adjacent mining lands. Prior to the treaty of Guadalupe Hidalgo, Mexico had made grants of land within the territory ceded. By Act of June 21, 1860 (12 Statutes, 71), Congress confirmed several of these grants. There were opposing claimants for one tract, and the Act provided that the heirs of the claimant Baca should select, instead of the land claimed by them, an equal quantity "of vacant land, *not mineral*, in the Territory of New Mexico," and that it should be the duty of the Surveyor General of New Mexico to make survey and location

of the lands so selected when thereunto required by the Baca heirs. December 12, 1862, a selection was filed in behalf of the Baca heirs, which contained a statement that the land was vacant and not mineral and applied for the survey and location of the tract in accordance with the provisions of the Act of Congress. Some intimation having been received by the Department that the location might cover mineral deposits, very specific instructions were issued to the Surveyor General as to the necessity of showing that the land was not mineral. The Surveyor General thereafter transmitted his certificate that the lands were not mineral and were vacant, and in his letter of transmittal explained the grounds upon which he made the non-mineral certificate. His explanation showed that he had made no personal investigation, but relied chiefly on the absence of mineral discoveries by others. The local Register and Receiver also made a formal non-mineral certificate. The Department at first rejected the Surveyor General's certificate as based merely upon information and conclusions. Later, apparently without receiving any additional certificate, but realizing that the grantees were entitled to action, the Department directed the Surveyor General to file the original

field notes of the survey, duly verified and authenticated, and thereupon in accordance with the Act of June 21, 1860, to approve the survey, but in his certificate of approval to add the special reservation contained in the statute as to its not embracing mineral land or interfering with any other vested rights if such existed. The Department expressed the opinion that the statute did not authorize the issue of a patent and that the plat approved by the Surveyor General would constitute the evidence of title. Accordingly the field notes and a map of the survey, certified and approved by the Surveyor General, were filed in 1864. His certificate of approval stated that the same had been examined and approved, "*subject to the conditions* "*and provisions of Section 6 of the Act of Con-* "*gress, approved June 21, 1860.*" The Eastern Star Mine was discovered in 1876 and a certificate of location filed, but upon ascertaining that this location was within the limits of the Baca grant, the locators abandoned the mine. The owners of the grant thereafter made various leases of the mine. In 1887 the defendant took from the management of the grant a verbal lease for three months, and being refused a renewal remained in possession without authority.

It was to recover this possession that the action was brought. This Court unanimously held that the title of the Baca grantees was not subject to challenge, but was "full, absolute and "unconditional." The contentions were made that Congress had granted only non-mineral land; that the tract was mineral and so not within the grant, and that the Land Department had never adjudicated its non-mineral character, but, on the contrary, had approved the location, *subject to* the conditions and provisions of the Act of Congress. The similarity of the contentions there made with the contentions made by the appellants in the present case is noteworthy. This Court, in considering the limits placed by the Act of Congress upon the grantee's right of location, held that the grantees were not at liberty to select lands which were then known to contain mineral, and said, at pages 332, 333:

> "We say 'lands then known to contain mineral', for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend

that the title, when it passed, should pass absolutely and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre-emption or townsite entries, the law excludes mineral lands; but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral."

It was pointed out that upon the Surveyor General was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select, subject to the control and direction of the Land Department, and that he had certified that the land was non-mineral. The Court commented on the suspicions entertained by the Department as to the character of the land, and there was clearly no doubt in the mind of this Court that the reservation clause was inserted in the Surveyor General's certificate deliberately for the purpose of protecting the interests of the Government. The Court then proceeded to consider the significance and effect of the reservation clause and said, at pages 337–338:

" We are of opinion that the insertion of any such stipulation and limitation was be-

yond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approv-

ing any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether."

It was held also that, although no patent had been issued, the filing of the certificate and its approval as the evidence of title provided by the statute in that case must be treated as having all the efficacy of a patent. The Court said further, at page 343:

> "While the approval entered upon the plat by the surveyor general under the direction of the Land Department was in terms 'subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860,' such limitation was beyond the power of executive officers to impose."

We are utterly unable to conceive how the decision in *Shaw vs. Kellogg*, *supra*, can be distinguished from the present case. The Act of Con-

gress making the grant to the Baca heirs excepted mineral lands from the operation of the grant in the same terms as the exception in the Southern Pacific Railroad grant. The exception was absolute and not an exception of such lands as the Surveyor General should determine to be non-mineral, that is, the mineral character was not expressly made dependent upon the finding of the Surveyor General, but it became his duty to decide the question in the same manner in which the duty of the Land Department to make such decisions arises under the railroad land grants, simply by force of the fact that he was the agent designated by Congress to perfect the conveyance. While the language of the reservation in the Surveyor General's certificate of approval is, of course, entirely different from that of the patent in suit, the difference is not important, for they were both made for the same purpose, and they were equally well calculated, so far as their language was concerned, to effect the desired purpose.

The formal certificate made by the Surveyor General that the land was non-mineral is not sufficient to distinguish *Shaw vs. Kellogg* from the present case, although the assertion that there was in that case an actual finding of non-mineral character is the chief reliance of the

appellants in this case as a distinguishing point. The Surveyor General's explanation accompanying his technical certificate to the Department showed that he had not made an actual investigation as to the character of the land, and no fact stands out more clearly in that case than the fact that the Department did not consider his report a sufficient finding as to the character of the land and refused to accept it as such. If a failure to make an actual determination were material, as claimed by appellants here, the case presented in *Shaw vs. Kellogg* would have been much more favorable to the mineral claimants than is the present case, for it was perfectly obvious from the evidence in that case that the department did not consider that the character of the land had been satisfactorily ascertained, and, for the express purpose of saving the rights of the government, dictated the reservation which was embodied in the certificate of approval under which the Baca grantees obtained their title. The decision of this Court in *Shaw vs. Kellogg* did not in the slightest degree rest upon any assumption by the Court that the surveyor general or the Department had determined that the land was non-mineral. It will be noticed that no such consideration entered into

the discussion of the question of the significance and effect of the reservation clause, the greater part of which discussion is quoted above. The decision of that question was placed squarely upon the absolute want of authority to make the conveyance subject to any such reservation, to annex any condition to the unconditional grant made by Congress.

In view of the reiterated arguments in opposing briefs based upon the differences between the nature of the railroad land grants and the grants made under general land laws, it is pertinent to observe that the Baca grant involved in *Shaw vs. Kellogg* was essentially a special and direct grant. And yet this Court attributed to the certificate of approval in that case (treated as the equivalent of a patent) all the presumptions and the effect of conclusiveness which are accorded to patents issued under general laws.

It is argued by appellants that the insertion of a mineral land exception in the land grant patents confirms the very title which Congress intended to grant, and merely gives effect to the intent of the granting statute, but that consideration was equally applicable to the case presented in *Shaw vs. Kellogg* and is necessarily

overcome by the other considerations which this Court considered controlling.

While it is impossible to add to the authority of the decisions above cited, it is pertinent to observe that the same view has obtained in the Department of the Interior. In *Courtright vs. Wisconsin Central Railroad Co.*, 19 Land Decisions 410, Secretary Smith, in 1894, denied an application to make a soldier's additional homestead entry on a tract patented under a railroad land grant, the patent containing a reservation clause in practically the same language as the clause in suit. The Secretary said, at page 412:

> "If it was the intention of the officers to leave the character of the lands as an open question then they acted without authority, for the issue of the patent ended their jurisdiction and power to hear and determine any question relating to these lands."

Notwithstanding this decision of Secretary Smith, the practice of inserting the usual reservation clause continued until 1903, when it was abolished by Secretary Hitchcock upon an application of the Northern Pacific Railway Company for the discontinuance of that practice. After a full consideration of the question the Secretary directed that in the future the clause

be excluded from all railroad land grant patents (32 Land Decisions, 342).

There are a few state and territorial court decisions upon which appellants rely, which are more or less in their favor. *Chicago Quartz Mining Co. vs. Oliver*, 75 Cal. 194; *McLaughlin vs. Powell*, 50 Cal. 64, and *Van Ness vs. Rooney*, 160 Cal. 131, treated similar mineral reservation clauses in railroad land grant patents as operating to reserve mineral land from the conveyance, but in none of these cases does the court discuss the proposition that the Department was without power to insert such a reservation in the patent or consider the decisions of this Court which have so held. And in *Paterson vs. Ogden*, 141 Cal. 43, 45, the same Court refers to Judge SAWYER'S decision in *Cowell vs. Lammers* (*supra*), that the clause is void, and appears to consider the question an open one.

Kansas City Mining & Milling Co. vs. Clay, 3 Arizona, 326, cited by appellants, involved no question of a reservation clause in a patent, and was practically, although not expressly, overruled by the same Court in *Old Dominion Copper Co. vs. Haverly*, 11 Arizona, 241.

This question, however, is a federal question, and, even if these state and territorial court de-

cisions by their reasoning commended themselves more strongly to consideration, as said in *Gale vs. Best*, 78 Cal. 235, 240, the views of this Court upon the proposition must prevail.

In *Eastern Oregon Land Company vs. Willow River Land & Irrigation Company*, the question of a mineral land reservation in a wagon road grant was considered by Judge BEAN in the Circuit Court for the District of Oregon, 187 Fed., 466. The defendant in that case had pleaded that the land in controversy was known to be mineral land at the date of the wagon road grant under which the complainant derived title. Judge BEAN dismissed the suit on the grounds, first, that the complainant had an adequate remedy at law, and, second, that the complainant had not shown that it would be substantially injured by the impounding of waters proposed by the defendant, to enjoin which the suit was instituted. Judge BEAN was of the opinion that the mineral land exception in the patent repelled the ordinary inference and presumption that the department determined the land to be non-mineral. This view of the meaning and intent of the reservation clause was advanced without discussion and without citation of authorities. Its expression does not seem to

have been essential to the decision of the case in view of the grounds upon which the decision was actually rested. This decision has been reversed upon appeal by the Circuit Court of Appeals for the Ninth Circuit, opinions filed November 1, 1912, and not yet reported. Circuit Judges ROSS and MORROW concurred in the reversal. The former reiterated his views as expressed in *Roberts vs. Southern Pacific Co.*, 186 Fed., 934, as to the invalidity of the mineral land exception, and Judge MORROW refrained from a discussion of that question, believing that the complainant was entitled to a reversal upon grounds not pertinent to the present inquiry. A dissenting opinion was filed by Circuit Judge GILBERT in which, *inter alia*, he concurs briefly in Judge BEAN'S view that the reservation clause should be construed as repelling the inference that the department had adjudicated the character of the land. The opinions of District Judge BEAN and Circuit Judge GILBERT on this point do not require serious consideration. It is not apparent from their discussion of the question that the pertinent authorities had been called to their attention.

Reference is made in opposing briefs to the condition commonly inserted in patents of placer mining claims to the effect that should any

vein or lode be claimed or known to exist at the date of the patent within the premises described in the patent the same is expressly excluded from the patent. These patents are issued under a peculiar statute which excludes veins or lodes from acquisition under a placer claim unless the applicant for the placer mine patent specifies the vein or lode in his application and pays the slightly increased price required for the purchase of vein or lode claims. The statute then provides that where a vein or lode is known to exist within the boundaries of the placer claim and the applicant does not so include the vein or lode in his application, his application " shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim " (R. S., Sec. 2333). Under this peculiar statute the effect of course will be the same whether or not a reservation of vein or lode claims is expressed in the placer mine patent, since the intent of the statute will in all cases have effect *ex proprio vigore*. This Court has had no occasion to decide, and, in view of the terms of that statute, never will have occasion to decide, any question as to the validity of that condition

in the patent, and no argument can be deduced from the practice of the Department in embodying the condition in the patent.

3.

The final clause of the Joint Resolution of 1870 was not a direction that this express reservation of mineral lands should be inserted in patents issued under the grant.

The Joint Resolution, (Appendix "B," p. iv.), after authorizing the Southern Pacific Railroad Company to construct its road on the route indicated by the map filed January 3, 1867, and directing the issue of patents for the lands co-terminous with each constructed section to the extent and amount granted in the Act of 1866, closes with the following language:

> "Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said Act."

It is argued that the language quoted was a direction to the Secretary of the Interior to insert this express reservation in all patents. A consideration of the history of the matter and an examination of the circumstances under which this

language was incorporated in the Joint Rosolution completely dispose of the contention.

The Secretary of the Interior refused to approve the map of definite location filed by the Railroad Company on January 3, 1867, on the ground that part of the route designated was not authorized by the charter of the Southern Pacific Railroad Company. On April 4, 1870 (California Statutes, 1869–1870, p. 883) the California State Legislature approved the route adopted by the Company, and thereupon the Company applied to Congress for the legalization of the route shown on the map of January 3, 1867. In the meantime the adjacent land had been withdrawn from entry by the Secretary of the Interior shortly after the filing of the map.

The resolution as reported by the Senate Committee was as follows:

> "That the Southern Pacific Railroad Company of California shall construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the 3rd day of January, 1867; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination

of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said Company, approved July 27, 1866, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land co-terminus to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866."

The obvious and avowed purpose of this resolution was to legalize the route adopted by the map of 1867 and remove any doubt that the land grant in the Act of 1866 applied to this route. It is to be observed that its form as reported included the direction to the Secretary of the Interior to issue patents but did not couple that direction with any saving or exception clause. Senator Cole offered as an amendment the addition of the saving clause above quoted. Senator Casserly offered an amendment to the Cole amendment, in substance saving the rights of all who had located as settlers adjacent to the route as legalized whether they had made their

settlement before or after the Secretary's withdrawal of the land from entry consequent upon the filing of the railroad map. In the debate which followed Senator Casserly maintained that Senator Cole's amendment did not quiet a controversy which had arisen as to the legality of the withdrawal order and saved only the rights of those whose settlements were prior to the withdrawal order and that they were sufficiently protected by the exceptions in the Act of 1866. Senator Cole argued that his amendment protected the rights of those who had settled previously to the withdrawal of the land in 1867; that the Casserly amendment was calculated to aid locators who were merely speculating upon the illegality of the order of withdrawal and entitled to no protection; that the railroad company had expended several million dollars on the faith of the land grant attaching to this route and that its grant should not be curtailed as proposed by the Casserly amendment. The Casserly amendment was defeated and the Cole amendment was adopted. The resolution as so amended was passed by the Senate and concurred in by the House. The only subject of debate was the propriety of saving the rights of settlers. Senator Cole's amendment was designed to confirm the exceptions in the Act of

1866 and to add to the original exceptions a saving of the rights of *bona fide* settlers on the land adjacent to the new route who might not have initiated legal pre-emption or homestead claims. The Attorney-General so construed the saving clause (16 Attorney-General's Opinions 80). Not one word was said in the debate as to any supposed necessity of inserting an express exception in patents when issued, or anything whatever on the subject of the form of patents. The proceedings in the Senate and House show beyond the possibility of question that the only matters under consideration and which the legislation as adopted was designed to remedy were the doubt as to the legality of the route definitely located by the Railroad Company and the protection of the unperfected rights of certain settlers which would otherwise be cut off by the resolution.

The reservation "expressly" made in the Joint Resolution, therefore, refers to the grant made or confirmed therein and not to the phraseology of patents to be issued. There were no facts before Congress which suggested any necessity of regulating the form of patents (See *Congressional Globe*, 2nd Session of 41st Congress, Parts 4 and 5, pages 3349, 3350, 3828, 3950 to 3953, 4700, 4701).

The propriety of the examination of the debates in Congress for the purpose of ascertaining the circumstances surrounding the adoption of certain legislation, and the evil designed to be remedied, as a means of learning the probable scope and intent of the legislation cannot be questioned (*Binns vs. United States*, 194 U. S. 486; *Holy Trinity Church vs. United States*, 143 U. S. 457, 464).

It might be added that if this saving clause were a direction that the patent should contain an express reservation, the Department has never complied with the instruction, for such a compliance upon this theory would require that the patent should expressly save and reserve, not only mineral lands, if any such should be found to exist, but also the rights of actual settlers, lands reserved, sold, granted, or otherwise appropriated, lands subject to pre-emption, or other claims or rights, at the time the line of said road was designated by a plat thereof, etc. The result of such a construction of the saving clause of the Joint Resolution is too preposterous to permit of serious consideration of the construction advanced.

It is stated in opposing briefs that the practice of inserting this exception in patents began prior to 1870. If this is true it is of course

absurd for appellants to contend that the exception was inserted pursuant to or because of any belief that the concluding clause of the resolution of 1870 constituted a direction for the insertion of an express exception.

4.

There is no agreement or estoppel by which this reservation clause can derive validity.

The certificate quotes an allegation made by the cross-bill to the effect that the Railroad Company, with full knowledge of all the facts, accepted and agreed to be bound by the conditions and reservations contained in the Act of Congress, the Joint Resolution and the patent, and accepted said patent and caused the same to be recorded, and is therefore estopped to resist or deny the binding force and effect of the same or any part thereof. The allegation is quoted in full in the statement of facts at the beginning of this brief. This allegation gives no validity by force of agreement or estoppel to the reservation clause. Upon a consideration of the full text of this allegation, it requires no imagination to perceive that it is merely the pleader's conclusion concerning the effect of an acceptance of the patent containing this clause and as such not

admitted by demurrer (*Equitable Life Assurance Society vs. Brown*, 213 U. S. 25, 43). The Court below has, however, certified a question which contemplates the existence of an express agreement between the Railroad Company and the officers of the Department that the clause should be effective to keep in the United States title to such of the lands as were in fact mineral. There is no basis for such a premise. By no amount of liberality of construction can the allegation on this subject in the cross bill be interpreted as an allegation of the making of an express contract.

Even if there were any facts before the Court indicating an express agreement of this character on the part of the Railroad Company, the difficulty would remain that there was no possible consideration for such an agreement. Assuming that the reservation clause could, by the consent of the grantee, be made effective to reserve actual mineral land, the Railroad Company could acquire no title by virtue of the patent, and any such promise or consent by the Railroad Company as is sought to be assumed could hardly be deemed to derive a supporting consideration from the issue by the Government of a document which then, on the

appellants' own theory, would be nothing but an express declaration that no title was conveyed. Unless previous decisions of this Court are to be retracted, the reservation was void on its face, and the patent was, on its face, a complete and perfect conveyance, and upon this premise the conclusion is obvious that the effect of the conveyance could not be altered by any collateral understanding, and that parol evidence of any understanding contrary to the terms of the patent would be inadmissible. Furthermore, the officials of the land department possess no more authority to enter into an agreement of this character than they possess to enforce such a reservation by inserting it as an express condition in the patent. They owed no duty to any one except their official duty to do what the law and the regulations empowered and directed them to do—that is, to determine the character of the land and to issue patents unconditionally conveying title, or to refuse such patents. Any other action on their part in the premises would be *ultra vires* and not binding on the government, and therefore not binding on the other party to the supposed contract, unless we are to have a departure from the accepted elementary principles of contract law.

It is clear that no estoppel could result from the acceptance of the patent embodying this clause. The patentee was entitled to rely upon the inherent invalidity of the clause, upon the Land Department's own view of the ineffectiveness of the clause instanced by the decision in *Matter of Spong*, 5 Land Decisions, 193, *supra*, and upon the practice of the Department of inserting the clause in all patents as a formality and of investigating the character of the land and refusing to issue a patent whenever it was believed to be mineral. There are no facts before the Court from which it can be concluded that the government has suffered any change of position in reliance upon the action of the Railroad Company in accepting this patent, such as is necessary to constitute an essential element of an estoppel. It is not apparent that the government has ever relied upon any claim that the Railroad Company conceded the validity of the mineral land reservation in a patent. The practice of the land department is inconsistent with any such claim. The department has uniformly refused to issue patents for lands known to be mineral. The decision of Secretary Hitchcock in 1903 that this clause should thereafter be omitted from railroad land

grant patents (32 Land Decisions 342) could not possibly have been made in the face of any understanding in the department that any land grant railroads had expressly or impliedly agreed that the reservation clause in the patents issued should be effective.

The patentee has no voice in the form of a patent, and any protest as to the insertion of a provision deemed objectionable would be unavailing. This patent was issued twenty-eight years after the grant and many years after the road was completed. Against the inaction of the Department during this long period, and against the objectionable form of this action when taken, the grantee had no redress.

And the last word on this point is that the appellants have not the privity of estate with the Government, which alone would entitle them to enforce an estoppel or to obtain the advantage of any contract between the grantor and the grantee.

Questions Certified.

FIRST QUESTION: "*Did the said grant to the Southern Pacific Railroad Company, include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?*"

We should not be disposed to quarrel with a negative answer to this question considered as an abstract proposition. It was decided by this Court in the *Barden* case, *supra*, that the grant did not include mineral lands, which were known to be such prior to patent. But it is certainly unnecessary to answer this question. Literally read, it is inconceivable that the Court below is in doubt about the proposition and is divided in opinion, as it has certified. This suggests the thought that the question is improperly framed and was intended by the lower Court to have some meaning beyond its apparent literal meaning. At any rate, it appears to us that a negative answer to the question as framed would almost certainly be misconstrued, for, reading the question and a negative answer in connection with the facts of the case, it would naturally be supposed by any persons not actual participants in this litigation that such an answer meant that mineral lands known to be such at the time of the patent, not being included in the grant, did not under any circumstances pass under the patent. If the question were merely " Did the said grant to the Southern Pacific Railroad Company include mineral lands?", without any reference in the

question to the issue of a patent, it would be less objectionable.

SECOND QUESTION: "*Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?*"

This question also seems to us objectionable in form and inappropriate. It presents no distinction as between direct attack by the government and collateral attack by strangers, and is not susceptible of a categorical answer. The question is based upon premises which are immaterial. In view of the Fourth Question, an answer to the Second Question is unnecessary. If it is answered at all, it should be answered in the affirmative, for the patent undoubtedly does operate to convey the legal title to the lands whether or not the Department had made an investigation as to their character.

THIRD QUESTION: "*Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?*"

This question appears to present accurately (except as to its unnecessary reference to "the grant") one of the propositions involved in this case and should be answered in the affirmative.

FOURTH QUESTION: "*If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?*"

This question is appropriate and should be answered in the affirmative.

FIFTH QUESTION: "*Is petroleum or mineral oil within the meaning of the term mineral as it was used in said Acts of Congress reserving mineral land from the railroad land grants?*"

This question has no basis in the record and is absolutely improper. The word "petroleum" occurs once in the facts certified. In connection with the allegations as to the mineral re-locations by the appellants in 1909, it is alleged "that prior

thereto said land had been properly and legally designated by the Department of the Interior as lands bearing mineral, to wit, petroleum, in commercial quantities." The allegation quoted is a piece of gratuitous information, or misinformation, as the case may be. The appellants do not allege that their locations, or the prior locations said to have existed in 1892, had anything to do with petroleum. They are alleged to have been "mineral" locations and made upon discovery of "mineral" and to be placer mining claims. The additional fact, if it is a fact, that the Department has designated any of this land as "mineral" upon the theory that petroleum is a "mineral" is quite immaterial.

But further, if the Court desired to decide this question, there is nothing in the record upon which such a decision can be made. The question is framed as a question of law, but it necessarily includes, if it is not exclusively, a question of fact. The Act of Congress says nothing about petroleum and contains no definition of the term "mineral." The question as certified assumes that petroleum is a mineral oil, but it is at least a question of fact whether petroleum is a mineral product or a vegetable product, and, if it is permissible to refer to the opinions of sci-

entists, we believe that the consensus of present scientific opinion would appear to be that petroleum generally is a vegetable product and that California petroleum is purely animal in its derivation. Whether petroleum is a mineral oil is a question of fact which must be determined by a jury if conflicting evidence appears. (See *Farquharson vs. Barnard Argue, etc., Co.*, 22 Ont. Law Reports, 319, affirmed by Privy Council, 28 Law Times Rep., 590; *Symington vs. Caledonian Ry. Co.*, Law Reports, 1912, Appeal Cases, 87, 93). In the event of an affirmative decision of that fact by a jury or in the event of the submission of uncontroverted evidence to that effect, the question of law would then be presented whether, notwithstanding petroleum appeared to be a mineral product, it was within the meaning of the exception in the land grant. The natural assumption on that question would be that Congress had in mind only such substances as were then generally and in the common understanding classed as minerals and as were subject to location as minerals under the public land laws, and petroleum was not within that class.

The question of fact and the question of law above indicated may be presented and require

determination in some case, but their decision in this case is neither necessary nor possible.

Rule 37 of this Court provides that upon the certificate of questions by the Circuit Court of Appeals there shall be transmitted by that Court "a proper statement of the facts on which such question or proposition of law arises." There is no such statement of the facts in connection with this petroleum question in the certificate in this case. And whether considered as a pure question of fact or as a mixed question of law and fact, it is improperly certified (*United States vs. Union Pacific Railway Company*, 168 U. S. 505, 512).

SIXTH QUESTION: "*Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the Railroad Company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.*"

This question is appropriate and should be answered in the affirmative.

SEVENTH QUESTION: "*If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Rail-*

road Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?"

If this question is answered, it should be answered in the negative, but it seems to us, as already argued, that it is not presented by the certificate, but is clearly an hypothetical question not supported by any facts contained in the certificate as required by Rule 37.

Conclusion.

We submit that the seven questions certified are subject to so many objections as to form, and and are in some instances so inappropriate, that this Court should require the whole record and cause to be sent up and decide the whole controversy under the jurisdiction conferred by Section 239 of the Judiciary Act of 1911. Although the questions which are controlling in this case

have already been repeatedly decided by this Court, attacks upon the patents issued under the railroad land grants continue to be made periodically and persistently, and the large amount of land conveyed under patents containing mineral reservation clauses requires that the principle involved should be finally and conclusively determined. The matter can be more definitely and emphatically disposed of by a decision of this Court upon the whole case than by its opinion embarrassed by the form of certified questions or by any decision of the Circuit Court of Appeals based upon the answers of this Court to such certified questions.

But, if the Court prefers to dispose of the case upon the questions certified, we submit that questions FIRST, SECOND, FIFTH and SEVENTH should not be answered, and that questions THIRD, FOURTH and SIXTH are alone sufficient to control the decision of the controversy and should each be answered in the affirmative.

MAXWELL EVARTS,
HENRY W. CLARK,
Of Counsel for Appellees.

APPENDIX "A."

(14 U. S. STAT., 292.)

An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast (approved July 27, 1866).

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers,

not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for

their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workman-like manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

* * * * * *

SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

APPENDIX "B."

(16 U. S. Stat., 382).

Joint resolution concerning the Southern Pacific Railroad of California (approved, June 28, 1870).

Be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July 27, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

APPENDIX "C."

Opinion in Case of Roberts v. Southern Pacific Company.

IN THE UNITED STATES CIRCUIT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

GEORGE D. ROBERTS ET AL.,
Plaintiffs,
vs.
SOUTHERN PACIFIC COMPANY ET ALS.,
Defendants.

Stripped of the mass of irrelvant and redundant matter contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the Government to a railroad company under a congressional grant, such patents, after describing the land thereby conveyed, containing the clause, "Yet excluding and accepting 'all mineral lands', should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron land'".

The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until 15 years after the issuance of patents to the Southern Pacific Railroad Com-

pany therefor, at which time they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they ask the Court to protect their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patents which were issued by the Government, and which they expressly allege conveyed the legal title to the land to the grantee therein named.

If the above quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, 15 years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents has turned out to be mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by Congress, notwithstanding the fact that the officers of the government, charged with the duty of inquiring into and determining the question and of issuing the government patent for the lands granted, had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it can not be sound. It would make of the patents a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit

were known to be mineral lands at the time they were applied for by the railroad company under the Congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other fraud on its part, the Government, or any one in privity with the Government, could justly complain and by suit, brought within the time fixed by Congress for that purpose, procure a cancellation of such patents. But this is not such a suit. Neither the Government, nor any one in privity with the Government title, is here complaining. The suit is by strangers to that title, for by the express averments of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery of mineral therein by the complainants, under the exception clause inserted in the patents, already quoted, but which I here repeat:

"Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

Where did the officers of the Government, charged

with the duty of issuing patents for lands granted by Congress, get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which Congress devolved upon the Land Department of the Government as a prerequisite to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the Joint Resolution of Congress of June 28, 1870 (16 Stats. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stats. 292).

By the latter act Congress chartered the Atlantic and Pacific Railroad Company, empowered it to build a railroad commencing at a point at or near Springfield, Missouri, along a generally described route to the Colorado River, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean—granting to such company by the third section of the Act:

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office."

The 18th section of the Act made a grant to the Southern Pacific Railroad Company, and is as follows:

"*And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

By section 4 of the Act it was provided that whenever the Railroad Company—"shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three Commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said

road. And from to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing Act of Congress, the Southern Pacific Railroad Company was a corporation of the State of California, and by its charter was authorized to build a railroad—" from some point on the Bay of San Francisco, in the State of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the Eastern line of said State of California, there to connect with a contemplated railroad from said eastern line of the State of California to the Mississippi River."

The Act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad " at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco." That company undertook to lay out a different route from that designated in its articles of incorporation, and on the 3rd day of January, 1867, filed with the Commissioner of the General Land Office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then Secretary of the Interior directed the Commissioner of the General Land Office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of twenty miles

on each side of the road, as shown on the map so filed January 3, 1867, and also the odd sections outside of the twenty miles and within thirty miles on each side of the said route, from which indemnity for land otherwise disposed of by the Government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked and the lands included therein were opened to sale. On the 20th of August following the latter order was suspended, so far as it related to lands south of San Jose, California, and November 2 and 11, 1869, the then Secretary of the Interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after sixty days' notice, of the lands included in the suspension order. On the 15th of the next month the orders of November 2 and 11, made the preceding month, were suspended. (Opinions of Attorney General, Vol. 16, pp. 80–89). July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by Congress (15 Stats. 187), and on June 28, 1870, Congress passed the Joint Resolution in question, which is here set out in full:

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior,

he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the Court to "account for, explain, construe, interpret, and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the Senate upon the resolution, where it was first introduced (Congressional Record, part V, 2nd Session, 41 Congress 1869–1870, pp. 3950, 3951, 3952, 3953).

While asking the Court to account for and explain the clause, counsel at the same time assert that the Court is not at liberty to refer to the debate in the Senate upon the subject. It is quite true that the meaning of the clause is to be determined from the language used by Congress, but counsel are mistaken in supposing and asserting it to be improper for the court

to refer to the debate. In *Binns v. United States*, 194 U. S., 486, 495, the Supreme Court said:

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, *United States v. Freight Association*, 166 U. S., 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church v. United States*, 143 U. S., 457, 464. When sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

"'The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committe, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.' Vol. 32, Congressional Record, Part III, page 2235."

In *Jennison v. Kirk*, 98 U. S., 453, 459, the same Court, in construing an act of Congress, and in referring to and setting forth certain statements of one of the Senators made in the Senate, said :

" These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning ; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act."

In the case of *People v. Stephens*, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the constitution of the state, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the constitution. See also *Wadsworth v. Boisen*, 148 Fed. 771, 778 ; *Ho Ah Kow v. Nunan*, Fed. Case No. 6546.

Turning to the debate in the Senate upon the saving clause added to the Joint Resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located upon public lands along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the General Land Office on the 3rd of January, 1867. By the Joint Resolution Congress sanctioned the change of route and made to the Southern Pacific Railroad Company a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of

the act of July 27, 1866, on each side of the line of road therein authorized ; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all *actual* settlers thereon, Congress provided in and by the Joint Resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and further that the grant of lands thereby made to the Southern Pacific Railroad Company along the new route was and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the act of July 27, 1866—the language of the Joint Resolution being, as has has been seen: "Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Those conditions and restrictions are specifically stated in the Act of 1866 and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted or otherwise appropriated, nor to any land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the road should be designated by a plat thereof filed in the office of the Commissioner of the General Land Office. Such are the express provisions of the grant of July 27, 1866, expressly referred to in the Joint Resolution for the conditions and restrictions of the grant of lands thereby made along the line of road thereby authorized to be built. There is absolutely nothing in the saving clause of the Joint Resolution, in

my opinion, either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions, or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the Joint Resolution of June 28, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat thereof filed in the office of the Commissioner of the General Land Office. There is no escape from this conclusion for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none. The result is that, according to the contention of counsel for the complainants, we would have Congress providing for the issuance of government patents for lands under its grant which upon their face would leave open for all time, to be decided by courts or juries, as

the case might be, not only the question as to the character of the land patented but also as to whether it had been reserved, sold, granted or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated the line of its road by filing a plat thereof in the office of the Commissioner of the General Land Office. As a matter of course, Congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by Congress and was designed, as the statute expressly declares, to convey the government title to the grantee. Of what avail would such an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue. In respect to such a contention this Court said in the case of *Doe v. Waterloo Mining Co.*, 54 Fed. 935, 940:

"If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by

showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Great reliance is placed by counsel for the complainants on this clause from the opinion of the Supreme Court in the case of *Barden v. Northern Pacific Railroad Co.*, 154 U. S., 288 [331]:

"The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action, (as held in *Deseret Salt Company v. Tarpey*, 142 U. S., 241), its right to lands which are in fact non-mineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is

not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

The observation that "the government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent" is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The Court could not have so decided in that case, for there was no such question before the Court, and could not have been, as no patent had been issued in the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral land therefrom, on the ground that when that grant became attached to the various sections within it by the definite location of the company's line of road, the land in suit was not known to be mineral land; and the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether that fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the government patent

therefor. The majority of the court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of non-mineral land only. But the court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the character of the land rested upon the officers of the Land Department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a court or jury subsequent to the issuance of the government patent. The court said [p. 326]:

"The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a

patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands and designate it in its conveyance.

" It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack.

" In *Smelting Co. v. Kemp*, 104 U. S., 636, 640, 641, this court thus spoke of the Land Department in the transfer of public lands : ' The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances

by this court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In *Steele v. Smelting Co.*, 106 U. S., 447, 450, the language of the court was that: 'The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In *Heath v. Wallace*, 138 U. S., 573, 585, it was held that 'the question whether or not lands returned as

'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department." And Mr. Justice LAMAR added: "It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country." If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight v. Land Association*, 142 U. S., 161, 178, as the "supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States," by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

"In the case of the *Central Pacific Railroad Company v. Valentine*, 11 Land Dec., 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: 'The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Depart-

ment that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment

rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the *Barden case* any support for the contention of the complainant's counsel that the officers of the Land Department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and excepting all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the same view of the decision in the *Barden case* is, I think, shown by its reference thereto in the case of *Shaw v. Kellogg*, 170 U. S., 313, where, at page 339, it says:

"Defendant relies largely on the decision of this court in *Barden v. Northern Pacific Railroad*, 154 U. S., 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which

the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

I am also of the opinion that the case last referred to—*Shaw v. Kellogg*—is direct authority for the proposition that the officers of the Land Department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid." The grant involved in *Shaw v. Kellogg* was made by section 6 of an act of Congress passed June 21, 1860, (12 Stats., 71) in settlement of a claim under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of non-mineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico, to make survey and location of the land so selected.

The grantees made their selection and applied for the land. Certain correspondence occurred between the Land Department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the Land Department instructing the surveyor general to approve the selection and make a survey thereof. The Land Department subsequently approved the survey, field notes and plat of the surveyor general, but in doing so added the words, "Subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The Act of Congress did not provide for the issuance of a patent, but the Land Department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to Congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land. Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

"These contentions are that Congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the Government; that the Land Department never adjudicated that this was non-mineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in per-

petual abeyance upon possible future discoveries of mineral within the tract."

In considering the limitation undertaken to be imposed by the Land Department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field notes and plat thereof, the Supreme Court said :

" What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered ; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes

of Congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffeback vs. Hawks*, *supra*, 406:

"'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.'"

It results from what has been said that the demurrers must be, and are, sustained and the bills dismissed at the complainants' cost.

Ross,
Circuit Judge.

APPENDIX "D."

Opinion of Attorney General Wickersham Approving Judge Ross's Decision in this Case.

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL "W. A."

153972–46 Washington, D. C.

MARCH 29, 1911.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR.

SIR:

Judge ROSS, in the United States Circuit Court for the Southern District of California, has handed down a decision in the case of *Roberts* against *Southern Pacific Company*, a copy of which I enclose for your information. This is the case concerning which there has been some correspondence between your Department and mine, arising out of the land grants to the Southern Pacific Railroad Company and the construction of the exception incorporated in the patents issued by the Interior Department prior to 1903, in the following language:

> "Yet excluding and excepting 'all mineral lands' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include, 'coal and iron land.'"

The Court in effect holds (first) that it was the duty of the Secretary of the Interior to ascertain prior to

the granting of patents whether or not the lands selected were mineral lands, and that, having reached the conclusion that they were not, that conclusion in the absence of fraud was final. This construction of the act is undoubtedly fortified by the provisions of the act of July 27, 1866 (14 Stats. 292) Section 3, which among other things, provides:

> "That all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

In other words, if the lands originally selected are found to be mineral lands, the railway company is given the right of alternative selection over other unoccupied agricultural lands. Obviously this privilege might be entirely lost if because years after a patent was issued, petroleum or some other mineral substance, should be found to exist in lands granted by patent pursuant to the original selection the grant should fail, and in the meantime all agricultural land from which selection might otherwise be made should have been taken up by other entrymen.

The Court holds that it was not competent for the Secretary of the Interior to insert the continuing "floating" exception of the character above quoted which should attach to the land if in the future it should be found that the land was mineral in character. As a matter of fact the language of the exception is ambiguous. It might possibly be construed to apply to the present or to the future; that is, the

Secretary of the Interior, without making any investigation, might have intended by this exception to reserve from the operation of the grant any lands which at that time were known or at any future time should prove to be mineral lands; or it might be that having made an investigation and being unable to find that any of the lands were mineral in character, he attempted to protect the interests of the Government against the future discovery of mineral by using this language for the purpose of excepting from the operation of the grant tracts of land in which subsequently minerals might be discovered.

The reasoning of the Court in respect to the legality of this practice seems to me to be conclusive. Congress granted in aid of the construction of the railroad certain sections of public land, not mineral, and authorized the company to select the lands under the direction of the Secretary of the Interior, and upon completion of sections of railroad for service, that patents should issue to the company, confirming to it the right and title to said lands. The purpose of this grant was to encourage and assist the railroad company to construct its lines. Obviously if the estate granted was incumbered with a "floating" indefinite species of condition subsequent, its market value would be greatly impaired.

Of course, it may be said that if the contention that all mineral lands are excluded from the operation of the grant and the patents, then mineral lands are not part of the granted estate, and the expression of an exception cannot operate to impair

it. It is not unusual for large areas of land to be granted reserving to the grantor all land of a particularly designated character within its boundaries; e. g., timber lands, saline lands, etc. In such cases it is the duty of the grantee to ascertain for himself what lands fall within the exceptions.

Upon the representation to the Interior Department that the Southern Pacific Railway Company had received patents to a considerable amount of lands which had been found to be mineral in character, and in view of the question which was mooted in this Roberts suit, your Department decided some months ago to withhold the issue of any patents to the Southern Pacific Company. It would seem to me that since this decision above referred to, there is no substantial reason why the issuance of future patents should be withheld.

The further question, however, arises upon which you asked my opinion sometime since; namely, whether or not the patents to be hereafter issued should contain an exception similar to that above quoted, which was the practice of the Department prior to 1903, or should contain no such exception. If Judge Ross' opinion is sound, as I believe it to be, it would not be proper to insert an exception in a deed; but if any exception is inserted it should be clear and not ambiguous. I am advised that the Roberts case will be appealed to the Circuit Court of Appeals and it is, of course, possible that the Court of Appeals may take a different view of the case, although I think it most improbable. But if you should deem it best to guard against any possibility of a different view being taken by the Court of

Appeals from that expressed by Judge Ross, you might during the pendency of the appeal and until the case is finally decided, issue patents containing an exception which would clearly except from the operation of the grants "all lands mineral in character now known or hereafter discovered to be such." Possibly if you tendered to the Railway Company a patent in that form they might apply to the Court to mandamus the issuance of a patent without the exception, which would bring squarely before the Supreme Court of the District of Columbia the right of the Secretary of the Interior to insert such a clause in the patent.

I make this suggestion merely out of an abundance of precaution and in order to suggest a method of affording absolute protection to you from taking any action which may fail to fully protect the interests of the United States in the premises.

Respectfully,

(Signed) GEO. W. WICKERSHAM,
Attorney-General.

Enc. 7972.

Supreme Court of the United States

OCTOBER TERM, 1912.

EDWARD KIRKE, Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, } No. 279

L. I. LANFERSIEK, T. M. AIKEN, Trustees, Appellants,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY, } No. 280

APPEALS FROM THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL MEMORANDUM.

MAXWELL EVARTS,
HERBERT W. CLARK,
Counsel for Appellants.

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Thesis on Petroleum (Prof. E. T. Dumble).... I–XXVIII

Petroleum is an organic substance, a natural animal or vegetable oil, or a mixture of such oils. It is derived from the remains of plant and animal life, through the action of bacteria, by natural processes of partial decomposition and of distillation, rendering or refining..... I

None of the processes have any tendency toward mineralizing the oil, or of fossilizing it, or petrifying it, or in any way changing it from an organic substance to a mineral or inorganic substance..... XXII

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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 682.

EDMUND BURKE, Appellant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

No. 683.

J. I. LAMPRECHT AND F. M. AIKEN, Trustees, Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and KERN TRADING AND OIL COMPANY.

On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL MEMORANDUM.

The fifth question certified to this Court is as follows:

> "Is petroleum or mineral oil within the meaning of the term mineral as it was used in said Acts of Congress reserving mineral land from the railroad land grants?"

This question naturally separates into two—

(1) Is petroleum a mineral?

(2) If so, is it within the meaning of the word "mineral" as used in the Southern Pacific Land Grant?

I.

Is petroleum a mineral?

The opinion of all scientific men familiar with the subject is that the petroleum of the California oil fields is an organic animal substance. On the other hand, the petroleum of Pennsylvania is, in the judgment of scientists, an organic substance of vegetable origin.

Broadly speaking, these two localities cover the great oil fields of America, so that we have it clearly determined that petroleum, in the United States at least, is either of animal or vegetable origin as it may happen to come from the fields of California or the oil deposits of Pennsylvania.

A decision by this Court as to whether petroleum is a mineral or not will of course cover all the oil fields of the United States, and this Court is now asked by the lower Court, without any evidence of any kind before it, to definitely determine that petroleum which the scientists say is either an animal or vegetable substance (so far at least as the United States is concerned) is neither one nor the other, but a mineral.

It is a fact of interest that a pool of petroleum in California when exposed to the air very rapidly becomes a pool of maggots. This is well known and is stated in the Special Report on Petroleum contained in

the Tenth Census of the United States (1880), Volume X, at page 69, in the following words:

> "The exceedingly unstable character of these petroleums, considered in connection with the amount of nitrogen that they contain and the vast accumulation of animal remains in the strata from which they issue, *together with the fact that the fresh oils soon become filled with the larvæ of insects to such an extent that pools of petroleum become pools of maggots,* all lend support to the theory that the oils are of animal origin."

It is certainly extraordinary that this Court should be asked to define as mineral a substance which insects seek as a food for their young. It is difficult to believe that that is a mineral which can be and is easily devoured by maggots.

It is further true that the great mineralogists, such as Professor E. S. Dana, are very specific in their statements that petroleum is not a mineral. A full discussion of this subject will be found in what may be termed a thesis covering the question of whether petroleum is a mineral, which is attached as an appendix to this supplemental memorandum.

Of course, at some time and in some case, the question whether petroleum is a mineral will undoubtedly be presented to and decided by this Court, but the point which we desire to make clear is that in this case without any evidence whatever before the Court, it does not seem as if it should be asked to undertake to definitely decide a substance to be a mineral which scientific men

without any uncertainty whatever have unhesitatingly classed as an animal substance when found in the oil fields of California and as a vegetable substance when found in the oil fields of Pennsylvania.

As the Government has obtained leave to intervene in this case it may not be improper to state that there is now pending a case in the lower federal court between the United States and the Southern Pacific Railroad Company in which this question arises. Testimony at great length is being and will be taken on this subject. In view of this it would seem as if this Court would prefer to await further information on the subject rather than to determine without any evidence on the question at all that a substance is mineral which has been decided by scientific men to be an animal substance so far as the oil in the lands in question is concerned.

II.

Is Petroleum a mineral within the meaning of the word "mineral" as used in the Southern Pacific Land Grant?

The Court below evidently assumed that whether a given substance was a mineral within the meaning of the word as used in the land grant was a question of law and has certified this question for the decision of this Court without evidence of any kind to guide it.

It is well settled by all the late decisions in the United States and in England that the question of whether a particular thing is a mineral within the min-

eral exception in a grant or deed is not a question of law but a question of fact to be determined on evidence as to what was the common understanding of miners, land-owners and business men at the time of the grant or deed. The latest case on this question is *Symington v. Caledonian Railway Company,* Law Reports, A. C. (1912), at page 87, where it was held that,

> "whether a particular substance is or is not a 'mineral' within the meaning and for the purpose of ss. 70 and 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, is a question of fact to be determined by the evidence",

and at page 93, Earl Loreburn said:

> "It is greatly to be regretted that in cases of this kind you have to decide upon the particular facts of each case upon evidence. I do not believe myself this requirement will prove so formidable as some seem to assume; but the only alternative that I can see is to allow it to be treated as a matter of law. *Now how the question whether freestone or any other kind of stone or substance which might be found in the soil is or is not a mineral within the statute can be treated satisfactorily as a matter of law really passes my understanding.* There is no method except to ascertain these things as matter of fact according to the rules that have been laid down.
>
> *I therefore think that there ought to be proof in this case and that the judgment of the Court below ought to be reversed."*

The impossibility of defining the word mineral and the appreciation that whether a given substance is a

mineral within the meaning of a grant or deed is a question of fact to be determined by the common understanding of ordinary people at the time of the grant is again brought out by the decision of the House of Lords in *Caledonian Railway* v. *Glenboig Union Fireclay Company,* Law Reports, A. C. (1911), page 290, where it was said at page 299:

> "My Lords, the principle of the decision in this House in the *Budhill,* A. C. (1910), pp. 116, 125, and *Carpalla* cases, A. C. (1910), p. 83, seems to me to have been this: the Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of 'minerals' is attainable, the variety of meanings which the use of the word 'minerals' admits of being itself the source of all the difficulty. It must be taken that what the railway company intended to get and the landowner intended to give was the land under the line, for the object was to give, not a wayleave, but a support. I say this speaking generally. Upon the other hand, if anything exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the landowner."

In *North British Railway* v. *Budhill Coal and Sandstone Company,* A. C. (1910), page 116, the House of Lords, speaking through Lord Loreburn, laid down the rule that the determination of what was

meant by the word mineral in a statute was a question of fact, and at page 127 he said:

> "It is impossible to give an exhaustive definition of the meaning of the much debated words that are to be found in s. 70. But I hope your Lordships may assist in their interpretation. In the first place, I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow* v. *Farie* (13 App. Cas., 657). *The Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral.*"

In the same case Lord Shaw of Dunfermline said, at page 139:

> "A true interpretation, when it takes the form of a definition, may be open to danger, but for practical purposes I respectfully agree with Lord Halsbury in his adoption of the language of James, *L. J.*, in *Hext* v. *Gill* (7 Ch., 712), that 'a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world and landowners'. The same canon of interpretation had a generation before been

adopted by Lords Meadowbank and Medwyn, although in much simpler language, in *Hamilton's case* (3 D., 1121). 'If you were to ask anyone,' said the latter judge, 'whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not.' This was decided to be the law of Scotland, and is so still. I do not think, as I have stated, that any case has been made out, apart from the authorities with which I have dealt, for a different or artificial interpretation of similar words because they occur in a statute."

In *Great Western Railway* v. *Carpalla United China Clay Company, Limited,* Law Reports, A. C. (1910), page 83, the lower Court spent eight days in taking evidence as to whether china clay was a mineral within the meaning of the Railways Clauses Consolidation Act, 1845, which excepted from lands purchased by railways "mines of coal, iron, slate or other minerals." At page 86 the House of Lords held, speaking by Lord Macnaghten as follows:

"The only question for consideration appears to be this: Is china clay a mineral?

"On this point a large body of evidence was adduced at the trial, which occupied eight days, before Eve, *J.* The learned judge reviewed the evidence with great care and came to the conclusion that china clay was not part of the ordinary composition of the soil in the district; its presence was rare and exceptional. He held on the evidence, and held, I think, rightly, that

it was a mineral, and therefore, in accordance with the provisions of the Act, excepted from the lands conveyed to the railway company.

"The learned judges of the Court of Appeal discussed the evidence at some length and came to the same conclusion.

"It would serve no useful purpose to go through the evidence again. It is enough to say that, having listened attentively to the able arguments of the learned counsel for the appellants and to such portions of the evidence as were read to the House, I am satisfied that the decision of Eve *J.*, affirmed by the Court of Appeal, is correct, and that this appeal must be dismissed with costs."

The case of *Farquharson* v. *Barnard Argue Roth Stearns Oil and Gas Co.* (22 Ont. Law Reports, 319), affirmed July 31, 1912, by the Privy Council of England (28 Times Law Reports, p. 590), is a most instructive case. The question presented was whether a deed dated June 22, 1867, which excepted and reserved to the grantor "mines and quarries of metals and minerals and all springs of oil" included petroleum and natural gas. The Court held that the question whether petroleum and natural gas were reserved by this deed, made so long ago, and one year after the grant in question to the Southern Pacific Railroad Company, was a question of fact to be determined by the evidence of ordinary men familiar with the situation at the time. The conclusion of the Court was that petroleum was reserved by reason of the reservation clause of "springs of oil", but that neither oil nor natural gas were re-

served in a deed given in 1867 by a clause reserving "mines of minerals." In other words, the Court held that upon the evidence no deed given in 1867 reserving minerals was understood by the parties that had to do with such things at the time as including petroleum. At page 335 the question was discussed as follows:

> "Granted that 'rock oil' and 'mineral gas' may be classed as minerals, are they or is either of them reserved or excepted?
>
> "While the scientific world is of disputatious mood as to the ultimate origin (*i. e.*, the genesis) of petroleum, there is a general consensus that its two valuable products, gas and oil, are compounds in different proportions of hydro-carbon—that each is a distinctive mineral of peculiar character, and, when found in sufficient bulk, may be properly spoken of as 'mines of minerals'. That is but one step in the inquiry, although it has been deemed sufficient in some reported decisions. But many of the older cases have had their foundations shaken by the deliverance of the House of Lords in a recent case, already alluded to, of *North British R. W. Co.* v. *Budhill Coal and Sandstone Co.* (1910), A. C. 116, a Scottish appeal, but which lays down principles of general application. *That case discloses an agreement among all the Law Lords that the determination of the meaning of the words 'mines and minerals' is a question of fact. That is to say, one is to find what these words mean in the ordinary sense in which they are understood and used by land-owners and those engaged in mining and commerce.* To this may be added (when the question is in

a conveyance *inter partes*), what was the understanding and intention of the parties at the time of the transaction? The outcome of the Scottish appeal is to confirm the opinion expressed as to the best method of inquiry by James, *L. J.*, in *Hext* v. *Gill* (1872), L. R., 7 Ch., 699, at p. 719, which was also advocated as the proper method by Mr. MacSwinney in his discussion of the decisions at pp. 16, 17, of his book on Mines published in 1907.

"Hence the present case will turn, not on the chemical or mineralogical signification of the terms used in the reservation, but on the meaning of them at the time, as used by ordinary persons concerned with the subject, and especially as to the meaning understood and accepted by the parties. A short reference may be made to the testimony of various witnesses called, representing farmers, business men and mining engineers, with, I think, no dissentient voice. Mr. Fleming, the treasurer of Chatham, says that, as commonly understood in that district, 'mineral' was a hard substance, and not fluid or gaseous. His memory goes back to 1865. Natural gas, he says, was discovered after the oil work had been prosecuted, and nothing was known of it in 1867 as commercially valuable. Mr. Gardner, brought up on a farm and engaged formerly in financial business (whose memory goes back to the oil excitement), says 'mineral' was something in metal form, and not oil as a general idea. Mr. Mickle, mining engineer and mining assessor for the Province of Ontario, says that 'mineral' in ordinary parlance did not include a fluid

(such as oil or gas) but was confined to minerals of metallic appearance. Mr. Drew, who had been a practical miner in oil, says that in 1867 'mineral' would not include gas or oil, but is understood to cover some hard substance. Mr. Hays, a technical chemist, says that ordinary men would not regard a fluid as a mineral, nor might he regard gas as a mineral". * * *

"The evidence in this case leads to the conclusion that neither oil nor gas in the petroleum beds was regarded as a mineral by the parties when the deed was executed in 1867."

This Canadian case, affirmed by the Privy Council, is most convincing that the question whether Congress in 1866 intended to include petroleum within the term "mineral", used in a land grant, is one of fact to be decided upon evidence.

The late decisions in the United States are in entire accord with the law as settled in England and Canada. The Pennsylvania courts have naturally had similar questions before them because of the great oil fields in that State. The latest decision of the highest court of that State is *Silver* v. *Bush* (213 Pa. St., 195), in which it appeared that a deed to certain property contained a clause "excepting the mineral underlying the same and the right of way to and from said mineral." There was no evidence that the parties intended that the word "mineral" in the deed should include natural gas. It was held that the natural gas was not re-

served to the grantor under the deed. The Court said at page 197:

> "The crucial question here, as in all contracts, is what was the sense in which the parties used the word. Mineral is not *per se* a term of art or of trade but of general language, and presumably is intended in the ordinary popular sense which it bears among English-speaking people. It may in any particular case have a different meaning, more extensive or more restricted, but such different meaning should clearly appear as intended by the parties. A very recent discussion of the subject was had in *Hendler* v. *Lehigh Valley Railroad Co.* (209 Pa., 256), where it was shown that while the word 'mineral' has a very broad meaning, already alluded to, and also a more restricted sicentific use, it has also a commercial sense, in which it is most commonly used in conveyances and leases of land, and in which it may be presumed to be used in such instruments. * * * In *Durham* v. *Kirkpatrick* (101 Pa., 36), it was expressly held that petroleum was not included in a reservation of 'all minerals,' the court saying 'in popular estimation petroleum is not regarded as a mineral substance, and can only be so classified in the most general or scientific sense. How then did the parties to the contract think and write? As scientists or as business men using the language and governed by the ideas of everday life?' It was held, therefore, that petroleum was not within the intent of the parties in reserving the minerals."

McKinney's Heirs v. *Central Kentucky Natural Gas Co.* (134 Ky., 239), was a case decided in 1909 by the Court of Appeals of Kentucky. The question there was whether deeds dated in 1871, 1874 and 1877, which conveyed to the grantee all minerals in the lands gave to the grantee "natural gas." It was conceded for the purpose of the argument that natural gas might be deemed to be a "mineral," but that the real question was whether it was a mineral such as the parties had in mind at the time of the execution of the deeds. In other words, did any of the people concerned understand that "minerals" included or was intended to include "natural gas." It was held that natural gas was not a mineral within the meaning of the word as used in the deeds in question, and at page 242 the Court said:

> "But the question to be determined is: What was the intention of the parties to the deeds at the time they were made? Did the grantors understand at that time that oil and gas were minerals and would pass with the other minerals named in the conveyances; and did they intend to convey the gas? In other words, did the minds of the parties to the conveyances meet upon the questions? Did the one understand that he was conveying, and the other that he was purchasing the gas thereunder? If not, the gas did not pass with the conveyances. The solution of this question depends upon the language used in the conveyances and the facts and circumstances surrounding the parties at the time they made them."

It is to be noted that the Kentucky Court discusses the question with reference to petroleum as well as natural gas; that is to say, the Court held that deeds given during the seventies conveying minerals to the grantee did not convey petroleum because at that time mineral was not in the language of ordinary men deemed to include any such substance as petroleum or gas.

Whatever earlier cases there may be to the contrary must be taken to "have had their foundations shaken" (*Farquharson case, supra*) by the foregoing unbroken line of decisions rendered during the last few years.

The peculiar qualities of petroleum and natural gas as differentiated from most other valuable substances under the surface of the earth are well known. Oil is like water. It is of a vagrant character. Here to-day and there to-morrow. It may be under one man's land now and under the land of another a month from now. There is no property in it until it has been reduced to possession. It is not to be compared in any way with gold or silver or any other solid substance which the ordinary man knows as a mineral. On this point this Court, speaking through Mr. Justice Shiras, said in *Brown* v. *Spilman* (155 U. S., 665, 669):

> "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land,

> and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property."

The great difference between petroleum and other substances beneath the surface of the earth is pointed out by Mr. Justice White in *Ohio Oil Company* v. *Indiana,* No. 1 (177 U. S., 190), where it was held that petroleum and natural gas were different from solid substances underneath the surface of the earth and therefore properly subject to the regulations of the statute of Indiana. At page 202 it was said:

> "Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs* under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-

transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners."

In *Wagner* v. *Mallory* (169 N. Y., 501), it was claimed that a lease granting the exclusive right to mine and excavate oil was an incorporeal hereditament and that petroleum was a part of the realty like coal, iron and copper. This claim was overruled and it was held that this right to mine oil was personal property and that petroleum was not part of the realty. At page 504 it was said:

"It will be observed that there is, by the terms of the lease, no grant of the oil as it exists in the earth, so that there is no passing of the title to the oil as it exists in its natural state, but that the right is limited to the mining and excavating, or the pumping and raising of the oil from the premises. It is a right to produce or extract the oil from the earth, yielding one-eighth thereof to the landlord. What was this right? Was it real estate or personal property? It is said that leases of this character are incorporeal hereditaments and that petroleum oil is a mineral and is a part of the realty like coal,

iron and copper. It is true it is a mineral substance, but it widely differs from the minerals mentioned, which are solids, having a fixed location in the earth like the rock itself. Petroleum oil is a fluid found in the porous sandrock of the earth. In some instances it, doubtless, exists in pools, but where are the pools located? They may be under the lands in which the well is drilled; they may be in the abutting or remote lands and may drain into the wells through seams or crevices in the rock, and then be extracted from the earth and reduced to possession by the operator. In this respect oil resembles water as it exists in the earth, especially salt and mineral waters, which have a market value, and is largely governed by the same rule of law. It, consequently, was held at a very early day in the history of the petroleum oil production that a man could not be restrained by his abutting neighbor from boring for oil upon his own premises, although he located his well within a few feet of the line and would necessarily drain the oil from his neighbor's land, if any existed therein. We, consequently, are of the opinion that no title to the oil vested in the lessee until it had been taken from the ground and reduced to possession."

If petroleum is not part of the realty, as the New York Court holds, it is very difficult to believe that Congress could have intended to mean by mineral something which was a fugacious thing and not real estate. No one would contend that Congress, at the time of the grant, intended to except from the grant

land containing mineral water, no matter how valuable it might be, but water is unquestionably a mineral, and some mineral waters are of great value. The reason Congress did not except such a substance was that it undoubtedly had in mind solid substances known to ordinary men as minerals, and not water or oil or gas.

As petroleum is so very different from all substances underneath the surface of the earth commonly called minerals and as the courts of last resort in this country and in England have of late years uniformly decided that whether a particular substance is a mineral under a grant or deed is not a question of law, but a question of fact to be determined on the evidence of men familiar with mining lands and business, it is not plain why the lower Court should expect this Court to pass upon this question without one word of evidence to assist it to a conclusion.

This Court has never yet undertaken to determine what was meant by the word "mineral" in the railroad land grants. Further than that it has recognized the impossibility of making such a definition and has practically stated, in accord with the decisions of the House of Lords above referred to, that it has not sufficient knowledge to attempt to make any definition of the word. In so stating, this Court means and intended to mean that such a question when it arose would depend upon the evidence in each particular case. There seems to be no other conclusion than this to be drawn from the words of this Court in *Northern Pacific Railway* v. *Soderberg* (188 U. S., 526), where it was held that lands containing granite were mineral lands. In

that case Mr. Justice Brown wrote the opinion of the Court saying substantially at page 533 that Congress in 1864 did not have a definite idea of what was meant by the word "mineral." His words were:

> "Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word 'mineral' it is clear that in 1884 when the line of this road was definitely located it had come to be understood as including all lands containing 'valuable mineral deposits' as well as lands 'chiefly valuable for stone'."

Again, at page 536, Mr. Justice Brown says:

> "We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the act of July 2, 1864. *With our present light on the subject it might be difficult to do so.*"

The words quoted from the opinion of Mr. Justice Brown in the *Soderberg case, supra,* can only mean that what Congress intended by mineral lands at the time of the granting act (1864 in the *Soderberg case;* 1866 in the present case) was not clear, and that before attempting to decide the question the Court would require to be enlightened on the subject. The only way this Court could get further light on the subject would be by evidence. The ground of the decision in the *Soderberg case* was that at the time of fixing the grant by the filing of the map of definite location in 1884 Congress had clearly indicated by acts subsequent to the granting act what it meant with reference to the particular sub-

stance under consideration in the *Soderberg case, i. e.,* granite. There was no act of Congress between the date of the grant in the present case (1866) and the date of filing the map of definite location (1867) which threw any light on the subject.

On the contrary, the acts of Congress subsequent to the granting act of 1866, clearly indicate that Congress never for a moment supposed in 1866 that petroleum was a mineral in the ordinary acceptation of the meaning of that word. This is clearly indicated by 29 U. S. Stats., 526, approved February 11, 1897, which provided that petroleum lands could be entered and patented under the placer mining laws. This statute is as follows:

> "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof."

Unquestionably this law was passed by Congress because of the decision of the Secretary of the Interior of August 27, 1896, In re *Union Oil Company* (23 L. D., 222), where it was held that land containing

petroleum did not fall within the contemplation of the mineral laws and could not be located and entered as a placer mine. In the course of his opinion the Secretary of the Interior said at page 227:

> "In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2320, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded."

It is true that this decision of the Secretary of the Interior was afterwards overruled by a decision of the Acting Secretary in re *Union Oil Company* (25 L. D., 351), but it was not overruled until after the passage of the act above referred to. The date of the act was February 11, 1897. The date of the overruling opinion was November 6, 1897.

The only conclusion to be drawn from the decision of the Secretary of the Interior in 1896 and the Act of 1897 is that prior to the time of the latter's passage, petroleum was not considered a mineral within the mining laws of the United States. If not a mineral in 1897 within the mining laws, how can it be contended to have been deemed a mineral more than thirty years before under a land grant?

We therefore find this Court to be in accord with the House of Lords and with the highest State courts in this country upon the proposition that whether

a certain thing is a mineral within the meaning of the land grant is a question of fact to be determined upon the evidence of men of business familiar with mining and with land at the time of the grant in question, namely, in 1866.

Another consideration which possibly may be of interest is that in the granting act, coal and iron were not excepted. The reason was that Congress desired the railroad to have its fuel and its material for its roadbed and equipment from the granted land if they should happen to be found therein. If petroleum had been a substance well known at the time and if its location in California at the time of the grant had been a matter of common knowledge, it would seem as if Congress in its grant would have included petroleum with coal and for the same reasons, viz.: in order that it might be used as fuel in its locomotives. Certainly this would have been done, if the entire absence of good coal from that part of the country had been then known.

At the present time there are pending in the federal courts of the district of California suits between the Government and the Southern Pacific Railroad Company in which this question is raised. Testimony is now being taken or is about to be taken by the lower Court upon this question, and those cases when they reach this Court will contain full evidence upon the subject, so that this Court will be enabled to pass upon this question in the light of all the evidence that can be presented.

Of course, any decision by this Court as to whether

petroleum is a mineral within the meaning of the word as used in the Southern Pacific land grant would not be limited in its force and effect to this particular case, but would furnish a definition that would affect all the grants of all the land grant railroads in the United States. It is a question of gravity and vast importance in its extent and far-reaching effect. It is a question of great interest as a legal proposition.

Under the circumstances therefore we respectfully submit that this fifth question should not be answered by the Court upon the ground that it is not a question of law, but a question of fact, and that in the absence of a statement of any facts in the certificate the Court will decline to answer the question and will await a case in which light can be thrown upon the entire subject by evidence introduced upon the trial of the case in the Court below, as is shown by the foregoing authorities to be the proper course.

III.

Facts necessary to an intelligent answer to some of the questions other than the fifth question certified are omitted from the certificate.

One of the basic propositions of appellants is that somehow and in some way the original alleged mining locations made prior to the patent withdrew the land covered thereby from the grant as fixed by the filing of the map of definite location in 1867. Apparently the idea in the mind of appellants is founded on the decision in *Northern Pacific Railroad Co.* v. *Sanders*

(166 U. S., 620). The *Sanders case* simply decided that a mining location which had been filed in the proper land office of the United States, if pending at the time the map of definite location was filed, was such a claim as to take out of the grant the lands covered thereby. In order to come within the ruling of the *Sanders case* it is argued by the appellants that as the land in question was withdrawn from the grant by reason of the prior location, therefore the land did not pass by the patent of 1894 and was open to location in 1909.

In order to make such an argument as this it is necessary that there should appear in the certificate certain facts as to the original location. These necessary facts are as follows:

(1) The date of the filing of the map of definite location; and

(2) The date of filing the mineral application in the United States Land Office by the locators.

The certificate is silent upon both propositions. It appears nowhere in the certificate whether the locations alleged to be prior to the patent were made in the United States Land Office or in some local State office. The time of the inception of these locations is not given. It is merely stated in the certificate that prior to 1892 which was the date of the making of the application for the listing of the lands by the railroad company the locations were made. It is, however, a long period of time between 1892, the only date given in the certificate, and 1867, the date of filing the map of definite location. We therefore have this situation: This Court is asked

to make a ruling in accordance with the *Sanders case, supra,* but without any evidence whatever as to the facts necessary to make such a ruling.

The certificate is also curiously defective in that it states that the original locators did not perform the requisite annual labor in the year 1908. It does not state that that was the first time that the locators failed to perform their annual labor. For all that appears in the certificate the original locators had never performed their annual labor, and the alleged locations for all that appears (and it probably was the fact) were abandoned immediately after their filing in some local State office and without the performance of any annual labor whatever.

The mining locations referred to in the certificate which are said to have existed prior to the patent to the railroad company are remarkable for four things:

(1) Nobody knows the name of the locator; at least the certificate does not give it.

(2) Nobody knows the date of the filing of the locations; at least the certificate does not give it.

(3) Nobody knows the place of the filing of these locations; at least the certificate does not give it.

(4) Nobody knows whether any annual labor was ever performed at any time with reference to these mining locations; at least the certificate does not state that any annual labor was ever performed.

The complaint of appellants is not that the Secretary of the Interior during the two years between the

application and issuance of the patent did not examine into the question, but that he did not have a hearing of which these supposed locators were given notice. How could the Secretary of the Interior have a hearing to which these locators were summoned to appear when nobody knew their names and nobody knew when or where their claims were filed? What occasion was there for a hearing by the Secretary of the Interior when no mining claim of any kind had been filed in the United States Land Office? The Secretary of the Interior had received the report of the Surveyor-General that the lands were not mineral, and nobody had even suspected the presence of mineral in these lands sufficiently to cause them to file any claim in the United States Land Office (Burke's Brief, p. 455). It appears by the certificate of the Court below simply "that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land and no *hearing* was had in the Land Office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same and that the patent so issued to the railroad company was issued without any *such investigation or determination*" (p. 2). We do not understand that this certificate means or is intended to mean that the Secretary of the Interior did not fully examine into this matter during the two years in which it was before him. It simply means that a hearing was not given to these mining locators whose names were unknown and whose claims were never filed in any United States Land Office.

In other words, the Court below was evidently unable to make in its certificate these important statements of fact. Undoubtedly the reason was that these original locations, if they ever existed at all, were some general blanket filings in a local State office made by somebody at a time when no doubt mineral locations were filed on any land wherever it might be situated in the State of California. Not locations filed in a United States Land Office because of the knowledge of minerals in the soil, but locations filed in some local State office on a chance and never followed up because there was no real reason to suppose the land contained any mineral deposit.

In the absence of such facts from the certificate it would seem that the practice of this Court is to decline to proceed and to dismiss the certificate. *United States* v. *Union Pacific R. Co.* (168 U. S., 505).

MAXWELL EVARTS,
HENRY W. CLARK,
Of Counsel for Appellees.

APPENDIX.

Petroleum Not a Mineral.

THESIS.

(1) Petroleum is an organic substance, a natural animal or vegetable oil, or a mixture of such oils. It is derived from the remains of plant and animal life, through the action of bacteria, by natural processes of partial decomposition and of distillation, rendering or refining.

(2) None of the processes have any tendency toward mineralizing the oil, or of fossilizing it, or petrifying it, or in any way of changing it from an organic substance to a mineral or inorganic substance.

(3) Petroleum is not a mineral.

1. PETROLEUM IS AN ORGANIC SUBSTANCE, A NATURAL ANIMAL OR VEGETABLE OIL, OR A MIXTURE OF SUCH OILS. IT IS DERIVED FROM THE REMAINS OF PLANT AND ANIMAL LIFE, THROUGH THE ACTION OF BACTERIA, BY NATURAL PROCESSES OF PARTIAL DECOMPOSITION AND OF DISTILLATION, RENDERING OR REFINING.

ORGANIC:

> Pertaining to objects that have organs; hence, pertaining to the animal and vegetable worlds; resulting from or exhibiting characteristics peculiar to animal or vegetable life and structure; organized.
>
> The term organic as applied to any substance in no way relates to presence or absence of life. The materials which compose the living body are, of course, organic in the main, but they are equally so after death has occurred—at any rate for a certain time—and some of them continue to be so for an

indefinite period after life has departed. Sugar, for example, is an organic product; but, in itself, it is of course dead after the organism which produced it has lost all vitality.

H. A. NICHOLSON.

(Century).

ORGANIC SUBSTANCES:

Substances which proceed from or constitute organic bodies.

(Webster).

ORGANIC BODIES:

Such as possess organs on the action of which depend their growth and perfection as animals and plants.

(Webster).

PETROLEUM:

Rock oil; a liquid, inflammable, bituminous substance exuding from the earth and collected on the surface of the water in wells and fountains in various parts of the world, or oozing from cavities in rocks. It is essentially composed of carbon and hydrogen.

(Webster).

An oily substance of great economic importance, especially as a source of light, occurring naturally, oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into rock; rock oil.

(Century).

Petroleum is one of the forms of Bitumen (Peckham, Rept. Tenth Census, p. 3).

Natural gas and petroleum are embraced among the products of the crust of the earth known as bitumens; other bodies in the same list are the semi-fluid maltha and the solid asphaltum (Orton, Eighth Ann. Rept. U. S. G. S., p. 485).

The bituminous substances occurring in Nature may be either gaseous, fluid, or solid. They are

composed principally of carbon and hydrogen and only occasionally do oxygen or sulphur enter into their composition in any considerable amount.

All bitumens arise from the same formational processes; the heavier—the later named members of the following series: Gases, Fluids (Petroleum), Solids (Asphalts, etc.),—are formed from the lighter for the most part through partial evaporation, but also in part through chemical change.

The fluid and solid Bitumens differ from other organic rocks, such as mineral coal, through their solubility in turpentine, benzine, ether, chloroform, bisulphide or carbon, etc. Hoefer, Das Erdoel (p. 1).

The literature of petroleum and allied bitumens is very extensive, 6,000 titles being catalogued by Redwood in his work on Petroleum.

The observations, experiments and theories recorded in these various publications have been carefully and critically examined by several of the later authorities on the subject, and the more important facts and theories quoted with proper reference to the original paper. The existence of such summaries and the critical remarks of these later writers in connection with them give the best index of what is really known on the subject. Furthermore, these are easily accessible, while the greater part of the original papers are not. For this reason the greater number of quotations given herein are from such summaries, for convenience of reference and verification.

Among these are:

PECKHAM, S. F.:

Report on the Production, Technology and Uses of Petroleum and its Products (Report Tenth Census U. S., Vol. 10. Washington, 1884).

In Part I, Natural History of Petroleum, etc., Mr. Peckham outlines the history of the discovery and development of Petroleum, its geographical distribution, its geological occurrence, its chemistry and its origin (pp. 1 to 75).

ORTON, EDWARD:

The Trenton Limestone as a source of Petroleum and Inflammable Gas in Ohio and Indiana (Eighth Annual Report of the U. S. Geological Survey, Part II, Washington, 1889).

Chapter I, Prof. Orton summarizes the various theories of the origin of Petroleum and Natural Gas and discusses them at length.

With slight alterations and additions, Prof. Orton has repeated these views in:

First Annual Report of the Geological Survey of Ohio—Columbus, 1890, and

Report on the Occurrence of Petroleum, Natural Gas and Asphalt Rock in Western Kentucky. Geological Survey of Kentucy, Frankfort, 1891.

REDWOOD, BOVERTON:

Petroleum, 2 Vols. London and Philadelphia, 1896.

Vol I relates the History and describes the Geological Distribution of Petroleum and Natural Gas, their Chemical and Physical Properties and their Origin.

In the new edition of this work (1906) these subjects are extended to include the results of later investigations, and a bibliography of 6,000 titles on the general subject is given.

HOEFER, H.:

Das Erdoel, Braunschweig, 1906.

Chapter VI, Origin—Gives résumé of the observations, experiments and theories of the numerous investigators of this subject, with reference to their publications.

CLARKE, F. W.:

The Data of Geo-Chemistry, 2nd Edition, Bulletin 491, United States Geological Survey, Washington, 1911.

"A Critical Summary of what is now known and a Guide to the more important literature on the subject."

Chapter XVI, The Natural Hydrocarbons, Composition, Synthesis and Origin of Natural Gas, Petroleum, Bitumen and Asphalt.

THEORIES OF ORIGIN:

> Generally speaking, they fall into three different categories, embracing those who regard bitumen as a distillate produced by natural causes, those who regard bitumen as indigenous to the rocks in which it is found, and those who regard bitumen as a product of chemical action (Peckham, p. 59).

This is somewhat differently stated by Orton:

> The theories as to the origin of petroleum and natural gas, including the derivations of Petroleum, asphaltum and maltha can be divided into two main groups, viz.: (1) Those which refer these bodies to inorganic sources, or, in other words, which make them the result of chemical affinity, acting on mineral matter, and (2) those that regard them as the result of a partial decomposition of vegetable or animal substances that have been stored up in the rocks (pp. 485-6)

and still more concisely by Clarke:

> The theories so far advanced may be divided into two categories—the inorganic and the organic (p. 693).

INORGANIC ORIGIN:

The various chemical theories of the origin of Petroleum, beginning with that of Berthelot in 1866, are reviewed by Mr. Peckham, who states:

> These chemical theories are supported by great names, and are based on the most complete and elaborate researches; but they require the assumption of operations nowhere witnessed in nature or known to technology (p. 61).

Prof. Orton also reviews these theories briefly and endorses Mr. Peckham's conclusion as follows:

> In fact that all these theories "require the assumption of operations nowhere witnessed in na-

ture or known to technology" we find enough to condemn them, or, at least, enough to forbid any large measure of confidence in them (p. 487).

Prof. Hoefer, after an extended review of the claims for inorganic origin of petroleum, concludes:

> From geological points of view, every hypothesis which attributes the origin of oil to inorganic sources is shut out (p. 173).

Prof. Clarke, however, after a full review of the theories, says:

> In conclusion, I may be allowed to suggest that nearly all of the proposed theories to account for the origin of petroleum embody some elements of truth. Sokoloff's cosmic hypothesis is sustained by the fact that hydrocarbons are found in meteorites. The volcanic hypothesis is sustained by the fact that hydrocarbons occur among volcanic emanations. The organic origin of petroleum, however, seems supported by the geological relations of the hydrocarbons which are found in large quantities only in rocks of sedimentary character. There is no evidence to show that any important oil field derived its hydrocarbons from inorganic sources (p. 704).

ORGANIC ORIGIN:

The economic history of petroleum begins with the completion of the Drake well in 1859; but the way had been well paved for its reception during the two decades just preceding that event, through the manufacture in France, England and America of shale oil, parrafin and kerosene by the distillation of cannel, Boghead and Albert coal and bituminous shale, and

> The relation between petroleum and the oils obtained by distillation from peat, lignite, and coal, led at an early date to a belief that petroleum was produced from one or all of these materials (Redwood, p. 236).

Formation from Coal.

In the definition of bitumen, Webster states:

> The liquid kinds come out from bituminous rocks or from clay beds containing coal or lignite.

Von Kobell and others considered anthracite to be the residue from the formation of petroleum from coal and Hoefer has numerous references of those who claim a similar derivation of petroleum.

Geike, describing the effects of eruptive rocks upon carbonaceous beds and particularly upon coal seams, says:

> During the subterranean distillation arising from the destruction or alteration of coal and bituminous shales, while the gases evolved, find their way to the surface, the liquid products on the other hand are apt to collect in fissures and cavities. In central Scotland, where the coal fields have been so abundantly pierced by igneous masses, petroleum and asphalt are of frequent occurrence, sometimes in chinks and veins in sandstone and other sedimentary strata, sometimes in the cavities of the igneous rocks themselves. In West Lothian intrusive sheets traversing a group of strata containing seams of coal and oil shale, have a distinctly bituminous odor when freshly broken, and little globules of petroleum may be detected in their cavities. In the same district the joints and fissures of a massive sandstone are filled with solid brown asphalt, which the quarry men manufacture into candles (Text Book of Geology, p. 561).

Even as late as 1891, Mr. Watson Smith argues in favor of such a derivation of petroleum in connection with some experiments on Japanese coal.

While there can be no doubt that petroleum may be and sometimes is produced in this manner we have no positive proof that it has ever been the means of producing quantities of any considerable economic importance.

The coal and oil fields are usually entirely distinct and the greatest oil fields of the world are far removed from any formations containing coal, as in Russia, Pennsylvania, Texas, California, and Mexico.

The evidence points to a derivation from materials similar to those from which coal was produced.

> The most probable view seems to be that both coal and petroleum are formed from organic mat-

> ter, but of different kinds and under slightly different conditions—that coal is formed *from terrestrial* vascular plants, in the presence of *fresh water,* while bitumen and petroleum are formed from more *perishable cellular* plants and animals, in the presence of *salt water* (Le Conte, Elements of Geology, p. 389).

Among the early statements of the organic origin of petroleum is that of Reichenbach in 1834:

> When we remember that coal is so filled with the remains of plants that its origin has been attributed entirely to the destroyed vegetables of an early period, it must appear probable that petroleum was formed from such plants as afford these oils, and, in a word, that our mineral oil is nothing but turpentine oil of the pines of former ages; not only the wood, but also the needle-like leaves, may have contributed to this process, which is not a combustion, but is, I believe, simply the result of the action of subterranean heat (Peckham, p. 65).

While by far the greater number of authorities agree upon the organic origin of petroleum, they differ among themselves as to whether it be from plants or animals and as to the place and manner of its formation. Some believe it to have been formed in the rocks which now enclose it, others hold that subsequent to its formation it was transported to its present location.

The theory that it is organic in origin and indigenous to the rocks in which it is found was held by Hunt and Lesley for Canada and the Pennsylvania region; by Wall for Trinidad and Whitney for California. These authorities are quoted at some length by Peckham and Orton:

> The facts observed in this locality appear to show that the petroleum, or the substance which has given rise to it, was deposited in the beds in which it is now found at the formation of the rock. We may suppose in these oil-bearing beds an accumulation of organic matters, whose decomposition in the midst of a marine calcareous

deposit has resulted in their complete transformation into petroleum, which has found a lodgement in the cavities of the shells and corals immediately near. Its absence from the unfilled cells of corals in the adjacent and interstratified beds forbids the idea of the introduction of the oil into these strata either by distillation or by infiltration.

In the township of Packenham, the large orthoceratites of the Trenton limestone sometimes hold several ounces of petroleum in their chambers, and it has been met with under similar conditions in Lancaster. It has also been observed to exude from the fossil corals of the Birdseye limestone at Montmorency (R. S. Hunt, 1863. Peckham, p. 62).

When in situ, it (the asphalt) is confined to particular strata, which were originally shales containing a certain proportion of vegetable debris. The organic matter has undergone a special mineralization, producing bituminous in place of ordinary anthraciferous substances. This operation is not attributable to heat, nor of the nature of distillation, but is due to chemical reaction at the ordinary temperature and under the normal conditions of the climate. The proofs that this is the true mode of generation of the asphalt, repose not only on the partial manner in which it is distributed in the strata, but also on numerous specimens of the vegetable matter in process of transformation and with the organic structure more or less obliterated. After the removal by solution of the bituminous material, under the microscope, a remarkable alteration and corrosion of vegetable cells becomes apparent, which is not presented in any other form of the mineralization of wood. * * *

Sometimes the emission is in the form of a dense, oily liquid, from which the volatile elements gradually evaporate, leaving a solid residue (Wall, Orton, p. 500).

In conclusion, it may be remarked that the marine infusorial rocks of the Pacific Coast, and especially of California, are of great extent and importance. They occur in the Coast Ranges from Clear Lake to Los Angeles. They are of no little

economical as well as scientific interest, since, as I conceive, the existence of bituminous materials in this state, in all their forms, from the most liquid to the most dense, is due to the presence of infusoria (Whitney, Peckham, p. 65).

In the case of the oil-bearing shales of California, the Petroleum is evidently derived from the animal remains with which the formation was originally filled. In composition, this oil agrees with the limestone oils already described.

Peckham speaks of this class of petroleum as formed of animal matter that has not been subjected to destructive distillation (Orton, p. 495).

PECKHAM'S conclusion:

> I am convinced that all bitumens have, in their present condition, originally been derived from animal or vegetable remains, but that the manner of their derivation has not been uniform. I should, therefore, exclude both classes of chemical theories; the first as impossible, the second as unnecessary. Then remains the hypothesis that bitumen is indigenous to the rocks in which it is found and that which regards all bitumens as distillates. * * *

In his discussion of this, he states as his conclusion regarding the derivation of California oils:

> The exceedingly unstable character of these petroleums, considered in connection with the amount of nitrogen that they contain, and the vast accumulation of animal remains in the strata from which they issue, together with the fact that the fresh oils soon become filled with the larvæ of insects to such an extent that pools of petroleum become pools of maggots, all lend support to the theory that the oils are of animal origin (pp. 67-69).

The theory that it was formed at one place and afterward transported to its present location is thus stated:

> The second view is that petroleum is derived from the secondary decomposition of organic matter, stored in the rocks. It assumes that the orig-

inal vegetable and animal matter has suffered a partial transformation and is now held in the rocks as hydrocarbon compounds, from which, by a process of distillation, oil and gas are derived. * * * (Orton, p. 488).

Newberry and Peckham have been the strongest advocates of this theory in the United States, and their views are fully given by Peckham, Orton and Redwood:

> I have already referred to the Huron shale as a probable source of the greater part of the petroleum obtained in this country. * * * The considerations which have led me to adopt this view are briefly these:
>
> First.—We have in the Huron shale a vast repository of solid hydrocarbonaceous matter which may be made to yield from ten to twenty gallons of oil to the ton by artificial distillation. Like all other organic matter, this is constantly undergoing spontaneous distillation, except where hermetically sealed deep under rock and water. This results in the formation of oil and gas, closely resembling those which we make artificially from the same substance; the manufactured differing from the natural products only because we cannot imitate accurately the processes of nature.
>
> Second.—A line of oil and gas springs marks the outcrop of the Huron shale from New York to Tennessee. The rock itself is frequently found saturated with petroleum, and the overlying strata, if porous, are sure to be more or less impregnated with it. * * * Again, the emanations of oil and gas from the Lower Silurian rocks at Collingwood, Canada, and on the upper Cumberland River, Kentucky, are associated with similar deposits of black shale which represent the Utica slate of New York.
>
> Third.—The wells on Oil Creek penetrates the strata immediately overlying the Huron shale and the oil is obtained from the fissured and porous sheets of sandstone of the Portage and Chemung groups, which lie just above the Huron and offer convenient reservoirs for the oil it furnishes (Newberry, Orton, p. 492).
>
> These oils are undoubtedly distillates, and of vegetable origin. The proof of this statement

seems overwhelming. Pennsylvania petroleum was examined in 1865 by Warren and Storer in this country, and in 1863 by Pelouze and Cahours in France, who found the lighter portion to consist of a certain series of hydrocarbons, identical with those obtained in the destructive distillation of coal, bituminous shales, and wood when the operation was conducted at low temperatures (Peckham, Orton, p. 492).

Bitumens are not the product of the high temperature and violent action of volcanoes, but of the slow and gentle changes at low temperature due to metamorphic action upon strata buried at immense depths. * * *

It is not necessary here to discuss the nature or origin of metamorphic action. It is sufficient for our purpose to know that from the Upper Silurian to the close of the Carboniferous periods the currents of the primeval ocean were transporting sediments from northeast to southwest, sorting them into gravel, sand, and clay, forming gravel bars and great sand-beds beneath the riffles and clay banks in still water, burying vast accumulations of sea weeds and sea animals far beneath the surface. The alteration, due to the combined action of heat, steam, and pressure, that involved the formations of the Appalachian system from Point Gaspe, in Canada, to Lookout Mountain in Tennessee, in involving the Carboniferous and earlier strata, distorting and folding them, and converting the coal into anthracite and the clays into crystalline schists along their eastern border, could not have ceased to act westward along an arbitrary line, but must have gradually died out farther and farther from the surface.

The great beds of shale and limestone containing fucoids, animal remains, and even indigenous petroleum, must have been invaded by this heat action to a greater or a less degree.

Too little is known about petroleum at this time to enable anyone to explain all the phenomena attending the occurrence of petroleum on any hypothesis; but it seems to me that the different varieties of petroleum * * * are the products of fractional distillation, and one of the strongest proofs of this hypothesis is found in the

large content of paraffin in the Bradford oil under the enormous pressure to which it is subjected.

If this hypothesis * * * really represents the operation of nature, then we must seek the evidence of heat action at a depth far below the unaltered rocks in which the petroleum is now stored (Peckham, Orton, p. 492).

Prof. Orton holds with Hunt, that petroleum is a result of primary decomposition of animal and vegetable tissue and not a secondary one as held by Peckham, and bases his opinion on the fact that Hunt's theory seems to find more support in the processes of nature at the present time.

We find the bitumen series in actual process of formation * * * resulting apparently from the primary decomposition of organic matter under normal conditions, and we do not find them resulting from secondary decomposition under similar conditions (Orton, p. 504).

Dr. Orton thus expresses himself:

Petroleum is undoubtedly indigenous to, and derived from, certain limestones, as Hunt has so strongly asserted. The Trenton limestone is undoubtedly the most important source of oil and gas in the Geological scale of the United States at the present time. On the other hand, Newberry's doctrines, that the great supplies of the Pennsylvania field are derived from Devonian shales, is becoming more firmly established and more generally accepted every year, though it seems likely that he has laid too much stress on *bituminous* shales. In other words, the theories are not exclusive of each other. Different fields have different sources. We can accept, without inconsistency, the adventitious origin of the oil in Pennsylvania sandstones, and its indigenous origin in the shales of California, or in the limestone of Canada, Kentucky, or Ohio.

The double origin of petroleum, from both limestones and shales—and it is not necessary to exclude sandstones from the list of possible sources—deserves to be universally accepted. In confirmation of this double origin, it is coming to be recog-

nized that the oil and gas derived from these two sources generally differ from each other in noticeable respects. The oil and gas derived from limestones contain a larger proportion of sulphur than is found in the oil and gas of the shales. Sulphur compounds impart to the oil a rank and persistent odor, from which they can be freed only with great difficulty. In the case of the oil-bearing shales of California, the petroleum is apparently derived from the animal remains with which the formation was originally filled. In composition, this oil agrees with the limestone oils already described. * * * Certain it is that the "limestone oils" differ in physical characteristics from the Pennsylvania oils, for example, in a marked degree. They are dark in color; they are heavy oils, their gravity ranging generally from 34 deg. to 36 deg. B,. though sometimes rising to 40 deg. or even 42 deg. They have a rank odor, arising from the sulphurous compounds which they contain. The oils of Canada, Kentucky, and Tennessee, and of the new field in northwestern Ohio, all agree in these respects, and the oil and gas of the Utica shale and the Hudson River group of the slate fall into the same category (p. 494).

Under the head of Vegetable and Animal Origin, Redwood covers practically the same ground, but gives a larger number of references to European authorities, and concludes:

> From the account given in this section, it will be seen that there has been abundance of speculation as to the origin of bitumen, and that, in regard to some of the theories, a considerable amount of experimental proof has been forthcoming. Probably, on the whole, the Hoefer-Engler views at present have the largest number of adherents, and in respect, at any rate, to certain descriptions of petroleum, are the most worthy of acceptance. At the same time, a careful study of the subject leads to the conclusion that some petroleum is of *vegetable* origin, and it therefore follows that no single theory is applicable in all cases (p. 240).

Hoefer, in his chapter on the origin of petroleum, gives the results of the work of a great number of geologists and chemists, both American and European, who have, by investigation and experiment, contributed to our knowledge of the subject. While Engler was probably the first one to come out strongly for the animal origin of petroleum, Hoefer has done much to give this theory full recognition, and his references on this particular view of its origin are very full and convincing. While he holds that by far the greater proportion of petroleum is of animal origin, in view of later discoveries and experiments, he concedes that he can see no real difference between the animal fats, from which it is supposed to be derived, and those of oil or wax-bearing plants.

The formation of adipocere from animal remains by the work of bacteria is fully discussed by Hoefer. The final production of oil from adipocere and sapropel, he attributes not to pressure distillation, but to a "garungsprozess," that is, a process of fermentation (Erdoel, p. 208).

Engle's own conclusions are, as follows:

> Petroleum, in the main, is produced from the fatty materials (solid and liquid fats, adipocere and waxes) of submerged animal and plant remains, after remaining organic elements have been disintegrated through putrefaction and rotting. The albumens, through separation of sebaceous material, may indirectly take part in such production, but only in small measure.
>
> The transformation of the fatty materials into petroleum has been accomplished under very diverse conditions of pressure, of temperature, and in cycles of time of different duration.
>
> The differences in petroleum are, primarily, caused through the differences in conditions of formation (pressure, temperature, time), and secondarily through the nature of fatty materials of varied derivation (Inter. Pet. Cong. Bucarest, Vol. 2, p. 35).

David White, Paleobotanist of the United States Geological Survey, in "Some Problems in the Formation of Coal":

> It was, perhaps, the most important of the brilliant achievements of the lamented Renault to show conclusively that in times past, just as at present, the fermentation and decomposition of organic tissue, whether vegetable or animal, was chiefly accomplished through the vital activity of microorganisms, by far the most important of which were the anaerobic bacteria. Evidence of the work of bacteria in the decomposition of vegetable tissues, now found fossil, has been observed in so many cases, covering so many plant types, and dating from so many periods of geological time as no longer to leave open to question its preeminence as a factor in coal formation.
>
> Renault has clearly shown that in the swamp, lagoon, or peat bog, the plant tissues are attacked by insects, worms, amoeboids, fungi, and bacteria, of which the last named are preeminently most effective, absolutely omnipresent, and always most persistent. The two first mentioned are chiefly instrumental in the mechanical dissociation of the tissues, while at the same time aiding the bacteria in penetrating to the different portions of the vegetable structure. In this work the fungi also were doubtless of especial assistance.
>
> If uninterrupted, the process goes on until all of the softer tissues are disintegrated and decomposed, leaving only the most enduring and indestructible parts, such as the densest cells, fragments of cuticle and seeds, or spore envelopes immersed in a dark, subgelatinous plastic or liquid mass, the "fundamental matter" or "fundamental jelly."
>
> Following the lines suggested by von Gumbel, they demonstrated that the bogheads, including the Torbanite and Australian Kerosene shales, are preponderantly composed of the residues, generally remarkably well preserved, of the thalli of various gelosic (gelatinous) micro-algae. In some cases these comprise nearly the entire rock mass, counting over 250,000 per cubic centimeter. Similar micro-algae are present in many of the richer bi-

tuminous shales, especially those exploited for illuminating gas. Evidence of the presence of zoological elements, including microscopical types, is usually observed, particularly in the deposits of Cretaceous or Tertiary age.

Observing that the algae coals studied by Renault and Bertrand yielded petrolic oils as well as highly illuminative gases on distillation, their richness seeming to depend on the algal proportion, the writer was prompted to examine several well- recognized oil rocks with a view to detecting the presence of analogous algae as constituting a probable original source of the volatile hydrocarbons. Micro-algae were found to form a considerable part of the oil shale reported to have come from the Permian of Brazil and the Eocene of Arkansas. Portions of the "oil rock" at Plattville, Wis., were found to consist mostly of what appear to be flattened, gelatinous, unicellular algae, probably allied to the Protococcales. The composition of this oil rock from the Trenton offered, in the writer's judgment, a satisfactory explanation of the genesis of the petroleum and gas in our Paleozoic formations. While the Diatomaceae may, in some instances, have been the source of the Tertiary and some Cretaceous oils and gases, the conclusion that those in the older sedimentary rocks are probably derived by pressure-distillation from gelatinous micro-alge appears, to the writer, to be well founded.

The question of the part played by algae in the genesis of petroleum was meanwhile being considered independently by Potonie, whose conclusions, appearing almost simultaneously are substantially the same. This able German paleobotanist, who now has devoted much research and discussion to the subject, applies the term "Sapropel" to the accumulating residium of the gelatinous or fatty algae mingled with more or less animal matter partialy decomposed or putrified in stagnant or quiet water.

Sapropel he calls the "mother rock" of petroleum (Economic Geology, 1908).

The most recent and in many ways the best review of this subject is that of Clarke, from which the following statements are taken:

> From data of this kind, and from the experiments cited in the preceding section of this chapter, it is evident that hydrocarbons analogous to natural gas, petroleum, and asphalt, may be derived either from animal or vegetable matter, or from both. This, I think, admits of no dispute, but argument is possible relative to the genesis of the larger accumulations of mineral oil.
>
> The nitrogen bases of California petroleum furnish perhaps the strongest evidence that the proteids contribute their share to the make-up of petroleum, and show also that these particular oils are of animal origin.
>
> Several other writers have brought evidence to bear in favor of the derivation of petroleum from fish remains. Dieulafait observed that the copper shales of Mansfeld are strongly impregnated with bitumen, and also rich in fossil fish. The petroleum of Galicia is always associated with menilitic schists in which fish remains are peculiarly abundant.
>
> Bertels, on the other hand, attributes the Caucasian petroleums to the decomposition of mollusks. In the Kuban district, the oil, accompanied by salt water, exudes directly from beds of molluscan remains, which occur in enormous quantities.
>
> E. Sickenberger has shown that in small bays of the Red Sea, where the salinity reaches 7.3 per cent. petroleum is actually forming as a scum upon the surface of the water. Living forms are abundant in these bays, and their remains, after death, furnish the hydrocarbons. The latter are to some extent absorbed into the pores of coral reefs, and so contribute to the formation of bituminous limestones. A still earlier publication by O. F. Fraas contains data of similar purport. Fraas found in Egypt shells filled with bitumen and noticed that the bituminous beds were rich in fossils, while the non-bituminous strata were poor. In the region of the Dead Sea, also, Fraas noticed that bitumen was abundant in beds of baculites, from which it

exudes to accumulate upon the shore. In this connection, it may well be noted that the brines which are so often associated with petroleum have, as a rule, a composition indicative of a marine origin, and do not resemble solfataric or volcanic waters. Furthermore, Mendeleef's objection to the possibility of forming petroleum at the bottom of the sea—namely, that being lighter than water it would float away and be dissipated—is not only negatived by Sickenberger's observations, but also by the well-known fact that mud and clay are capable of retaining oily matters mechanically. The littoral sediments probably aid in the process of petroleum formation, if only to the extent of retaining the fatty substances from which the oil is to be produced.

The derivation of petroleum from vegetable remains has had many advocates, although the hypotheses have not all been framed on the same lines. L. Lesquereux, studying the Devonian oils of the eastern United States, argued in favor of their derivation from cellular marine plants, especially fucoids, whose remains abound in the petroliferous formations. Ligneous or fibrous plants, on the other hand, yield coal. This hypothesis led Vouga to suggest that great masses of fucus, like those of the Sargasso Sea, might sink to the bottom of the ocean, and there, decomposing under pressure, could yield petroleum. Redwood states that the salt marshes of Sardinia are sometimes covered by sheets of seaweed, which are in process of decomposition into an oily substance resembling petroleum, and similar occurrences have been noted on the coast of Sweden. These phenomena are probably not exceptional, and deserve a more precise examination than they have received hitherto. An observation by W. L. Watts, that the saline waters associated with petroleum in the central valley of California are unusually rich in iodine, appears to have some relation to this class of hypotheses. Watts connects this iodine with the familiar content of iodine in seaweed, and regards the latter as a probable source of this particular oil.

Data of this class might be multiplied almost indefinitely. For instance, C. E. Bertrand and B.

Renault have shown that Boghead mineral, torbanite, and kerosene shale, from which oils are distilled, are derived from gelatinous algae, whose remains are embedded in what was once a brown, humic jelly.

Kramer and Spiker's views have not met with very general acceptance, but they seem to contain elements of value. H. Potonie's hypotheses, for example, seem to be a broadening of Kramer and Spiker's. This writer calls attention to the "faulschlamm" or "sapropel," a slime, rich in organic matter, which is formed from gelatinous algae, and accumulates at the bottom of stagnant waters. Such a slime, Potonie believes, may be the parent substance from which bitumen, by a process of decay, was probably derived. In this connection, and with reference to the adequacy of the proposed source, it is well to remember the enormous accumulation of "oozes," namely, the radiolarian and globigerina oozes, on the bottom of the sea. The organic matter thus indicated is certainly abundant enough, if it can decay under proper conditions, to form more hydrocarbons than the known deposits of petroleum now contain.

These remarks upon the oceanic sediments at once suggest an intermediate group of hypotheses, which assume a mixed origin for petroleum. Animal matter in some cases, vegetable matter in others, or both together, are supposed to be the initial source of supply. A. Jaccard, for example, argues that the liquid oils are derived from marine plants, while the viscous or solid bitumens may originate from mollusks, radiates, etc. Some oils, again, are supposed to be of mixed origin, and it would seem probable that the last class is the most common. Ideas of this kind have repeatedly been enunciated with reference to American petroleums—that of Pennsylvania being attributed to marine vegetation, that of California to animal remains. The American literature of petroleum is rich in suggestions of this order.

Dr. Clarke concludes:

Wherever sediments are laid down, inclosing either animal or vegetable matter, there bitumens

may be produced. The presence of water, preferably salt, the exclusion of air, and the existence of an impervious protecting stratum of clay seem to be essential conditions toward rendering the transformation possible. Seaweeds, mollusks, crustaceans, fishes, and even microscopic organisms of many kinds may contribute material to the change. In some cases plants may predominate; in others animal remains; and the character of the hydrocarbons produced is likely to vary accordingly, just as petroleum varies in different fields (p. 703).

Quotations of this same general tenor could be added *ad libitum,* but certainly this is amply sufficient to prove that from the very beginning the organic origin of Petroleum has been accepted by nearly all authorities on the subject. While they may have differed as to just what class of organic remains the petroleum came from or as to the processes through which these remains passed in their transformation, the claim that the sources were organic has found comparatively few contestants, and the fact that the resulting petroleum is also organic, has found none at all, since, even those who held strongly for its deriviation from chemical reaction, in which mineral matters were involved, recognized the resultant as an organic substance. This has also been proven beyond dispute by the optical activity of petroleums, since only organic oils possess such quality (Clarke, p. 702). Furthermore, none of the process of mineral analyses are in anywise adapted to the study of petroleum, and those of organic analysis are the only ones that have been or can be used for determining its composition.

The three quarters of a century that passed between the publication of Reichenbach's statement in 1834, and that of Clarke in 1911, marks a great circle of research, which, after going far afield in search of all other possible sources, comes back at last to the starting point. Reichenbach's idea was that it was the oils and resins and waxes of plants from which the petroleum was derived and the dominant belief to-day is that of Engler and Hoefer, that

it is principally derived from the oils and resins and waxes of plants and animals.

Other materials may have contributed their quota to the general supply, but it is to the remains of the more minute plants and animals, which, in their decomposition through bacterial action produce such fatty materials, that the bulk of the product is due.

2. NONE OF THE PROCESSES HAVE ANY TENDENCY TOWARD MINERALIZING THE OIL, OR OF FOSSILIZING IT, OR PETRIFYING IT, OR IN ANY WAY CHANGING IT FROM AN ORGANIC SUBSTANCE TO A MINERAL OR INORGANIC SUBSTANCE.

MINERALIZE:

> To make mineral; to reduce to a mineral form; to impregnate with a mineral; to communicate the properties of a mineral to.
>
> (Webster).

MINERALIZATION:

> The act or process of mineralizing; the process of converting or being converted into a mineral as a metal into an oxide, sulphuret or other ore. The conversion of vegetable matter into coal is not properly mineralization, although sometimes so-called. Proper mineralization of vegetable matter does take place, however, as when wood is converted into opal, or becomes silicified, as very frequently happens, under certain conditions. This is commonly and properly called fossilization or petrifaction and more rarely mineralization.
>
> (Century).

Since the conversion of vegetable matter into coal is not properly mineralization, the similar process by which vegetable and animal matter is converted into petroleum cannot properly be called mineralization, and is not mineralization any more than the conversion of a birds food into guano can be termed mineralization. Both are alike formed from animal and vegetable substances through the

action of living organisms, and both remain organic substances.

The conversion of the organic substance petroleum to a mineral could only be made by such chemical change as would give it the characteristics of a mineral and thus reduce it to mineral form; or to impregnate it with a mineral or mineral matter which would also imply a similar chemical change. Either process would destroy its qualities as petroleum.

It is believed that many of the asphaltums are derived from the partial evaporation of petroleum and some of these become so nearly homogenous that they are given specific names, but even then they are not true minerals.

The process of formation has no tendency toward fossilizing or petrifying the petroleum, nor have the conditions under which it occurs in the earth.

The terms fossilizing and petrifying both imply mineralization.

A fossil is any evidence of the former existence of a living being. It may be either an organic or an inorganic, that is, mineral substance, although produced by organic processes. Shells and corals, although produced by living organisms, being composed of mineral matter, are mineral substances and those of periods preceding the immediate present are called fossils, if found either on the surface or below it. They may retain their original composition or they may be silicified (fossilized or petrified) or otherwise altered, but are always mineral substances.

Trees, on the other hand, are organic substances, and occur fossil in several ways. The cypress trees found in the Port Hudson clays of the Louisiana and Texas coast at depths from 100 to 1800 feet are fossil wood and as truly wood in structure and substance as when they were first buried.

In formations older than this, we encounter fossil tree trunks more or less lignitized or converted into lignite, but the substance of the tree is still organic. Occasionally we find a trunk which has been lignitized and a part of the lignite silicified or opalized; that is to say, the or-

ganic substance of the lignite has been replaced by the inorganic mineral silica through the process called silicification, petrifaction or fossilization, so that we have in the same fragment of fossil wood both organic, or non-mineral, and inorganic, or mineral, conditions. In place of silica, copper or iron may replace the lignite, so that the fossil wood may not only be a mineral, but an ore.

That nothing of this kind has taken place in connection with petroleum, is self-evident.

3. PETROLEUM IS NOT A MINERAL.

MINERAL:

> Any inorganic species having a definite chemical composition.
>
> (Webster).

> Any constituent of the earth's crust; more specifically any inorganic body occurring in nature and having a definite chemical formula and further having distinguishing physical characters.
>
> (Century).

> In its most enlarged sense—all substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of, and incapable of supporting, animal and vegetable life.
>
> (Bryan, Law of Petroleum and Natural Gas).

> A mineral then is any substance in nature not organized by vitality, which has a homogeneous structure. The first limitation here stated—not organized by vitality—excludes all living structures, or such as have resulted from vital powers. (J. D. Dana, Manual of Mineralogy, 1857-1871, p. 15).
>
> The third kingdom of nature, the Inorganic, embraces all species not organized by living growth. Unlike a plant or animal, an inorganic species is a simple chemical compound possessing unity of chemical and physical nature throughout, and alike in essential characters throughout all divers-

ity of age or size. (J. D. & E. S. Dana, Text Book of Mineralogy, 1883 to 1893).

A mineral is a body produced by the processes of inorganic nature, having a definite chemical composition, and, if formed under favorable conditions, a certain characteristic molecular structure which is exhibited in its crystalline form and other physical properties * * * Finally, mineral species, are, as a rule, limited to *solid substances;* the only liquids included being metallic mercury and water. Petroleum, or mineral oil, is not properly a homogenous substance, consisting rather of several hydrocarbon compounds; it is hence not a mineral species. (E. S. Dana, Text Book of Mineralogy, 1898).

Hydrocarbon Compounds.—The hydrocarbon compounds in general, with perhaps a few exceptions, are not homogenous substances, but mixtures, which, by the action of solvents or by fractional distillation, may be separated into two or more component parts. They are hence not definite mineral species and do not strictly belong to pure mineralogy, rather, with the recent gums and resins to Chemistry, or, so far as they are of practical value, to Economic Geology (E. S. Dana, System of Mineralogy, 1892, p. 996).

Appendix to the Hydrocarbons.—The substances included here are: 1, Petroleum, passing into the viscid bitumen, maltha or mineral tar; 2, the solid bitumen, Asphaltum; 3, Mineral Coal. These are in general more complex substances than those included in the preceding pages and have still less claim to be regarded as definite mineral species (E. S. Dana, System of Mineralogy, 1892, p. 1015).

Among all the definitions of a mineral there is not a single one that fits petroleum.

It has been shown that it is not inorganic, but organic; that it has no definite chemical composition, but is a mixture of several hydrocarbon compounds; that, being fluid, it has no distinguishing physical characters, in this respect differing even from water, which crystallizes in freezing. It is a fluid, and therefore not a part of the

solid body of the earth. The maggot-filled pools of the California oil fields prove that the oil of that region, at least, is capable of sustaining life. The evidence is clear that this oil has resulted from vital powers, and Dana, our best authority, states plainly that "Petroleum or Mineral Oil is not properly a homogenous substance, consisting rather of several hydrocarbon compounds; it is hence not a mineral species."

Therefore, Petroleum is not a mineral.

Furthermore, neither geologists nor chemists, nor mineralogists, consider it a mineral. If they seemingly write of it as such, it is because of a very loose construction of the term.

There are, so far as I can find, only two possible grounds for considering petroleum a mineral.

1. In its present condition, it shows no organic structure and may, therefore, be classed as inorganic, in which case, while not a mineral species, it might be called a mineral aggregate comparable to the clays, inorganic rocks, etc.

Lack of organic structure is, however, in itself, no proof whatever of the inorganic character of any substance. Sugar not only has no organic structure, but it has as definite a chemical formula and as distinct a crystalline form as salt or any other mineral, and yet it is a purely organic substance, and when pure, contains no mineral matter of any kind. The same is true of thousands of other organic substances in daily use.

Amber is another example; it is a fossil resin, being simply the gum from ancient pine trees of several species, exuded during life or produced during maceration and decay, and collected in beds of certain geological formations, from which it is mined by digging. It is a true organic substance, containing no mineral matter whatever, and yet has no more organic structure than has the resin exuding from our pines to-day.

The natural parrafins and other waxes are similarly organic substances with no trace of organic structure,

and some of these occur in the earth in such quantity as to be economically valuable, and are, therefore, mined.

Moreover, if lack of organic structure be sufficient to render a substance inorganic, the converse should also be true, and the presence of organic structure should be proof of the non-mineral character of any substance. This is clearly not the case, as is shown by the fact that in fossil wood the organic substance may be replaced by different minerals, silica, copper, iron, etc., and be changed thereby to an inorganic or mineral substance, and yet the organic structure be so perfectly preserved that the character of the original tree can readily be determined.

In all cases, therefore, it is the nature of the substance itself which determines its organic or inorganic character, and not the form in which it may occur.

Petroleum when pure contains no mineral matter of any kind, and has been clearly proven to be an organic substance. Since it is neither a mineral itself nor combined in any way with other mineral substances, it cannot properly be called a mineral aggregate.

2. The fact that it is gotten from the earth by what may be considered a species of mining.

This does not make it a mineral any more than amber or the natural waxes, which are won by actual mining, are mineral, or any more than guano, which is also dug from the earth, is made a mineral thereby, and no one, I think, for a moment would put guano down as a mineral, although it does at times furnish us, by solution and crystallization, more or less of the mineral niter or saltpeter.

The United States Geological Survey apparently treats petroleum as a mineral in their annual publication "Mineral Resources of the United States," but against this we have the statements of the members of the Survey that it is an organic substance, and, therefore, cannot be a mineral. While the publication is called "Mineral Resources," it had its beginning in a Report of the

Mining Industry of the United States, and since petroleum may be classed as a product of the mining industry, it was correctly included therein, but neither its inclusion in this report nor in those following it can make petroleum a mineral when it is not.

The only contention for the mineral character of petroleum, that I can find, is in its connection with land and with legal matters, and even then, many decisions can be found which plainly state its non-mineral character. From the few opinions I have read, it appears to me that in some cases, at least, the facts, as we now apprehend them, were not properly set forth. I think this is clearly shown in Section 4 of Bryan's Law of Petroleum and Natural Gas, page 11.

Petroleum is not technically a mineral, unless it be so by a legal technicality, and the opinion of the people, as contended for, is just that of the geologists.

Therefore, so far as this investigation goes, the only basis for the classification of petroleum as a mineral, is the decisions in the courts in connection with certain classes of land litigation that it is to be regarded as a mineral, while in other classes of litigation, they decided that it is not to be so regarded.

E. T. DUMBLE.

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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 279.

EDMUND BURKE, APPELLANT,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

No. 280.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES, APPELLANTS,

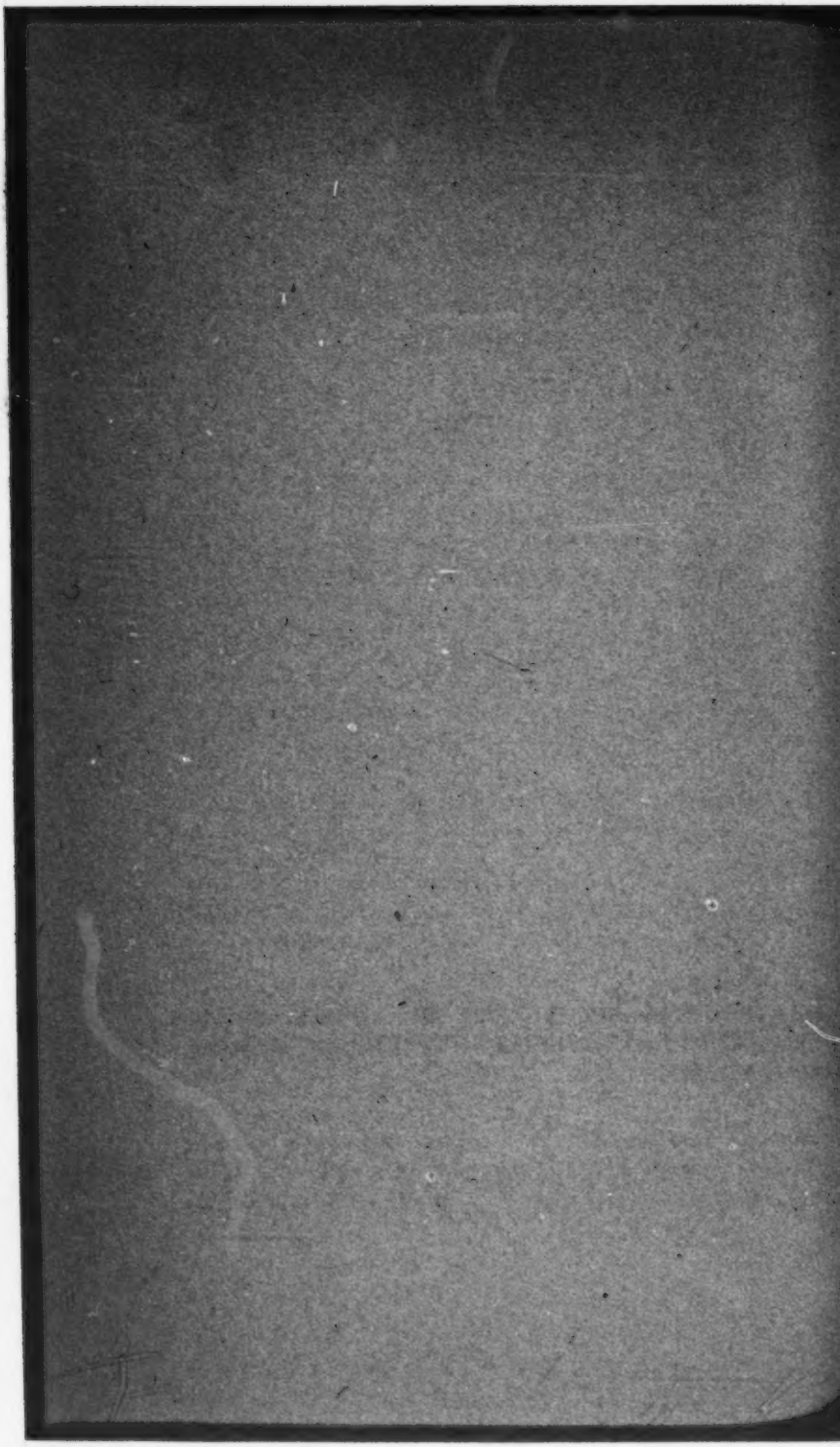
vs.

SOUTHERN PACIFIC RAILROAD COMPANY AND KERN TRADING AND OIL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM ON BEHALF OF APPELLEES IN REPLY TO GOVERNMENT'S SUPPLEMENTAL MEMORANDUM.

GORDON M. BUCK,
A. A. HOEHLING, Jr.,
Of Counsel for Appellees.



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Mr. E. T. Dumble, who prepared the thesis entitled "Petroleum Not a Mineral," attached as an appendix to the supplemental memorandum filed herein on behalf of the

appellees, has long been a trusted employee of the Southern Pacific Company. He first entered the employ of one of the subsidiary companies of the Southern Pacific system in the year 1876. Though not at all times subsequently in its employ, he has continuously since 1897 been the consulting geologist of the Southern Pacific Company.

The thesis above referred to was prepared by him for the information of Mr. William F. Herrin, the chief counsel of the Southern Pacific Company on the Pacific Coast. It was forwarded by the latter to the late Maxwell Evarts, the then general counsel of the Southern Pacific Company in New York. Mr. Evarts subsequently decided to use the thesis as an appendix to the supplemental memorandum above referred to. Had Mr. Dumble known that the thesis was to be presented to this court, or used for publication, he would have prepared the manuscript with more care as to details. The thesis is substantially correct. There are, however, cases in which omissions have been made from quotations without indicating such omissions by asterisks.

In its supplemental memorandum the Government has attacked the accuracy of the thesis. The Government's memorandum lays stress upon the fact that in the formation of petroleum a geodynamic or pressure distillation process has occurred and that the omission of the thesis to recognize this part of the process as stated by White and Clarke has misrepresented their views. Yet, in summarizing Mr. Dumble's thesis the Government's memorandum, at the very outset, itself falls short of exact or even substantial accuracy. It says of Mr. Dumble's thesis (pp. 2-3):

> "This appendix dwells insistently upon the organic origin of petroleum and upon the organic processes of decomposition and putrefaction through the aid of micro-organisms to which the original vegetable or animal substances, of which petroleum may be said to be the ultimate (though not the immediate) derivative, have been subjected; and the entire trend of its argument assisted by the manner in which it selects and concatenates definitions and excerpts from

> the writings of scientific authorities is to make prominent the organic nature of the original substances and the organic character of the first processes of transformation so as to induce in the reader's mind the idea that the product itself must also be organic, and, consequently, nonmineral."

For the purpose of comparison the first point of Mr. Dumble's thesis which appears printed in the appellee's supplementary memorandum first in bold-faced black type and again in capitals on page 1 of the appendix is here quoted, as follows:

> "(1) Petroleum is an organic substance, a natural animal or vegetable oil or a mixture of such oils. It is derived from the remains of plant and animal life, through the action of bacteria, by natural processes of partial decomposition and of *distillation, rendering or refining.*"

This shows that Mr. Dumble, contrary to the inference sought to be conveyed, did have in mind and did mention both stages of the process of petroleum formation. He did not conclude, however, that the second stage in this formation changed the initial vegetable and animal matter into inorganic matter. In concluding that petroleum was still an organic substance, he applied the word "organic" as it is commonly used by scientists and others and in accord with the usual definitions as they are quoted on pages 1 and 2 of his thesis.

It thus appears that the fundamental difficulty with the present argument of the Government is that it raises a fictitious issue. It was not the purpose of the Dumble thesis to use the articles of Mr. White and Dr. Clarke to establish a claim that heat and pressure had nothing to do with the formation of petroleum. Such a contention was not required by fact, nor is it essential to the conclusion reached by him that petroleum is not a mineral. The obvious purpose of the argument by Mr. Dumble was to show that it was com-

monly agreed among scientists that petroleum is of organic origin. The present argument of the Government admits that there is such common agreement. We may, therefore, safely consider that this important premise is established.

The weak point in their argument is the assumption that an animal or vegetable substance becomes inorganic, and hence mineral, the moment life ceases and "geodynamic" forces have effected a physical or chemical change in the substance. Sanction for this assumption is sought to be supplied from the writings of Mr. David White and Dr. Clarke. As no such statement can be found in the writings of either, counsel have found it necessary to interpolate the words "organic" and "inorganic" in the extract from Mr. White's work quoted on page 6 of the Government Supplemental Memorandum. In this remarkable way there is introduced into the article written by Mr. White an arbitrary line between organic and inorganic substances, which Mr. White never attempted to draw and never recognized, as we shall show by other quotations from the same article. No authority for this line of distinction is given, other than the quoted statement from Mr. White's article with this arbitrary modification by counsel.

It is now asserted (p. 4) that Mr. White, in recent testimony, did say that his article would not support the contention made by Mr. Dumble, but would contradict it. Although we do not so understand his evidence, we do not feel that we can discuss with propriety in this case testimony claimed to have been given in another case, the record of which is not yet made. We shall, therefore, confine ourselves to the printed article of Mr. White, which was presumably written at a time when his mind was free from possible influence of pending litigation.

As there is no scientific authority for the line of distinction between organic and inorganic substances being placed where counsel for the Government have placed it, it was not to be expected that Mr. Dumble could have anticipated the necessity of meeting the arguments now based on this

fictitious assumption. The inference sought to be conveyed now that he intentionally omitted portions of the articles in question is, therefore, without support. The omitted portions were not necessary to the establishment of the point he was seeking to make and which is now conceded—that petroleum is of organic origin.

Every point sought to be made by the Government in its Supplemental Memorandum is based on this unauthorized interpolation of the words "organic" and "inorganic." As this basis is without scientific or popular recognition, conclusions drawn from it are not to be relied upon. An attempt is made, likewise without the citation of scientific authority, to attribute to substances produced or changed by given forces, the character of the forces themselves. Thus, it is said that a substance altered by the action of bacteria is still organic because vital forces have made the change. On the other hand it is said that when the change is accomplished by the forces of "chemical affinity, heat, pressure, etc." (p. 6), the resultant is an inorganic and mineral substance, because heat, pressure, etc., are "inorganic." Heat and pressure, even in nature and without the assistance of man, are commonly applied to animal and vegetable substances and produce marked changes by growth or other alteration, without any one thinking of the resulting substance being other than organic. If the "inorganic" character of the force is the determining factor, it can make no difference whether the force is applied by nature alone or by man. If the present argument of the Government is correct, the charred tree in the forest and the roast brought upon the table are equally inorganic, for in each life has ceased to act and heat has produced marked alteration. To be consistent with their own theory they must argue that each is now a mineral substance. The process of distilling whiskey from grain involves chemical and physical changes in which heat plays an important part, yet we do not anticipate that it will be seriously contended that whiskey is a mineral. Mine timbers have been compressed by caving rock until

they have been reduced to a small fraction of their original bulk and have lost all visible appearance of being wood, resembling rock in hardness and appearance. By the same reasoning this material must be classed as a mineral substance.

If the so-called "inorganic" forces acting upon organic matter necessarily produce "inorganic" substances, as now argued by the Government, it must follow by the same reasoning, that *organic* forces acting upon inorganic matter must produce organic substances in all cases. But such is not the case. It is, for instance, an accepted fact that rocks are often distintegrated and materially altered by plant acids and, in some instances, by living bacteria (Clarke, Data of Geo-chemistry, p. 460). No scientific authority will be found claiming that the compounds thus formed are *organic*, merely because the altering forces were organic.

It is true that the operations of "inorganic" processes or forces such as heat, pressure, etc., acting in the earth's interior on organic substances may destroy their organic structure and may change the organic compounds of the original animal or vegetable substances by rearrangement of the same hydrogen, oxygen, and carbon elements into other similar or even entirely different organic compounds. It is true also that various hydrocarbon compounds in living and dead organic substances on the surface of the earth undergo similar changes in chemical composition, both by natural and artificial processes, under the influence of these same forces of heat and pressure. The one class of processes which take place in the earth's interior and therefore termed "geochemical" or "geophysical" is neither more nor less mineralizing than the others taking place on the surface of the earth which are termed simply chemical or physical.

Such chemical or physical transformations, in themselves, are not recognized by either chemists or mineralogists as mineralizing processes.

To show this clearly it is only necessary to recall the fact that animal oils (lard oil, tallow oil, etc.) are produced by

rendering the fat of animals by heat, and by pressing the resulting substance at proper temperature, a process very similar to that claimed as the final stages in the production of petroleum. These forces certainly destroy the organic compounds but they do not thereby mineralize the oil or make it an "inorganic" substance of organic origin. It is only "inorganic" in the limited sense of not being organized or having organs similar to living things. It is not inorganic in the sense that it has lost the earmarks of an organic substance and has therefore become a mineral, or a mineral substance.

Scientific literature will be searched in vain for a determination of the point at which an organic substance becomes inorganic. The truth of the matter seems to be that scientists have never found it necessary to draw any such line. They have assumed, with apparent unanimity, that a substance is still to be classed as organic for some time after life forces have ceased. And, in accord with the common or unscientific usage, they do not seem to have thought it necessary to speak of substances as inorganic as long as their organic *origin* was apparent or probable, no matter how great the changes. Mr. White himself speaks of coal as an "organic" substance in numerous places without deviating from the customary scientific usage. In doing so he had in mind the fact that the material composing the coal is, largely if not entirely, the *same material* that originally formed the vegetable deposit. Coal is called organic because it possesses characteristics "peculiar to vegetable life and structure," which is one of the tests given in the Century Dictionary under the word "Organic."

Mr. White, who is announced as "Chief Geologist of the Geological Survey," in the argument of the Government, made the following statement in his article on "Some Problems in the Formation of Coal" in the June-July number of Economic Geology for 1908:

> "The sedimentary nature of our stratified coals is not now seriously questioned by any person pos-

> sessed of geological training. It is no longer necessary to argue that it is a stratified carbonaceous deposit of first-hand organic debris in which the vegetal elements greatly predominate, at least optically" (p. 292).

It is to be noted that he uses the term "organic" to describe the coal in its final form. This was not done by chance merely, as we shall show by other quotations from the same article. No process of interpolation of words can change the direct character of this statement.

Origin then, rather than present vitality, is the prominent factor commonly accepted in determining whether a substance shall be called "organic" or "inorganic." This is well shown by the introductory paragraph of a recent book entitled "The World's Minerals," by Leonard J. Spencer, of the Mineral Department, British Museum, and editor of the "Mineralogical Magazine," in which he says:

> "The natural objects found on the surface of our earth, or within its crust at a moderate distance from the surface, may be conveniently classified into three great groups or kingdoms—the animal, vegetable and mineral kingdoms. The two first embrace everything organic—that is to say, everything that is or has been, endowed with life; these are largely made up of the chemical element carbon combined with the elements (hydrogen and oxygen) of water. The mineral kingdom on the other hand, includes all inorganic bodies that have not been produced by the agency of life. Contrasted with materials of organic origin, they show a much greater diversity in the chemical elements that enter into their composition."

There is no suggestion in this statement that Mr. Spencer considered that a substance fell within the mineral kingdom the moment life forces ceased to act. He includes in the organic kingdoms everything that is or "has been endowed with life," thus indicating that origin is a controlling factor. Mr. Spencer does not include petroleum in his book

but does include coal and asphaltum in an extra chapter headed "The Organic Substances," saying in explanation: "In the systems of classification in mineralogy they are usually relegated to an appendix or omitted altogether. But on account of their great economic importance they cannot be completely neglected."

The actual mineralization of a nonmineral or organic substance can only be effected by addition or exchange of an element or elements not possessed before or by dissociation into its elements and consequent destruction of it as an organic substance. Mineralization of this nature is almost universally by replacement as in petrifactions, etc., or by the elimination of substances or elements until a final stable, or permanent, condition is reached as, for instance, graphitization. The substance then has a definite chemical composition as well as form and is a true mineral. As stated in the appendix, p. XXIV, nothing of the kind has occurred in the production of petroleum and it is therefore still an organic substance in the accepted meaning of that term.

As the Government charges that the opinions of Messrs. White and Clarke have not been correctly stated, it seems desirable to make further quotations from these two authors.

At page 5 of the Government's supplemental memorandum the following statement is made:

> "Mr. White's paper, when carefully studied, indicates the essentially inorganic nature of both coal and oil and shows that geodynamic earth processes have played a necessary part in their formation."

A critical reading of Mr. White's paper, "Some Problems of the Formation of Coal," does not show in any place a suggestion that he considers that the alteration of organic matter into petroleum or coal by biochemical or dynamo-chemical processes makes either the resulting petroleum or coal inorganic.

The following extracts from Mr. White's paper are pertinent (all italics below being by the writer of this paper):

"Everybody who has burned coal has probably observed that the ordinary coal, whether 'bituminous,' lignite, or anthracite, usually exhibits large quantities of the *remains or refuse of vascular plants*, of which only small fragments of the harder parts are preserved. The latter often constitute distinct *woody layers*, some of the pieces being rarely of very large size. In these coals the softer tissues have become obliterated through the macerative process and have doubtless contributed to the fundamental matter (liquid or 'jelly') in which the surviving and more resistant portions were bedded or suspended" (page 300).

"*Woody matter* is particularly abundant in the lignites ('xyloid') of North Dakota and the so-called No. 1 coal of western Illinois. Such fragments are abundant in practically all the coals of the interior basins. They are relatively scarce in certain other coals, such, for example, as some of the Texas lignites and certain 'splint' coals of the Appalachian trough" (page 301).

"It is not improbable, however, that algal matter enters in varying proportions into the composition of most of our coals, though it may be obliterated by putrefaction or masked by the predominant woody matter, or obscured by the opacity of those coals altered by dynamic influences. What may be the effect of these obscure or even invisible ingredients it is not yet possible to estimate. Undoubtedly they have in many cases exerted a large influence in shaping the characters and qualities of the coals. It is possible, for example, that some proportion of algal matter may be essential to the best coking qualities. In fact the writer is inclined to attribute to *algal* matter the fusibility of our coking coals" (page 301).

In this instance it is plain that the author's idea is that even in such coals as may have been altered by dynamic influences, this algal matter exists as such and is consequently still organic.

"For the observations made thus far tend, in the interpretation of the writer, to establish a fusion of the coal in combustion when the *algae are present in any considerable numbers.* This is a question that should be fully put to the test" (page 301).

"The writer is disposed also to believe that the bituminous elements derived from the fully decomposed animal remains have participated to a very important extent in the infiltration of the thalli of the *undestroyed algae,* thus enriching the latter with combustible matter of a distinctly *bituminous character*" (page 308).

"The paper coal of Tovarkovo, which consists of the *brown flexible cuticles of a lower carboniferous bothrodendron* stuck together in a *humic acid paste,* is perhaps nearest comparable to a *modern peat that is scarcely altered*" (page 313).

Nothing could be more clearly stated than the organic character of this coal.

"At the same time it is plain that, on account of the manifold vicissitudes to which the *original organic matter* is exposed from the time of its accumulation to the *moment of exploitation,* the relative amounts of the final residual matter must vary greatly, much of the ingredient material being totally destroyed, while the remaining proportions are reduced to obviously different stages or conditions. Some of it has gone into the probably variable composition of the fundamental ground mass and other amorphous liquid or volatile products; some of the cell walls were not completely broken down in the biochemical process, and these must have entered the dynamo-chemical period with compositions differing from that of the fundamental matter" (page 317).

Here he clearly states the organic character of the coal from the time of its accumulation to the moment of exploitation, and in the remainder of the paragraph he sim-

ply gives the various alterations through which the organic matter passes, none of which are claimed by him to have had any influence in changing it into an inorganic substance.

> "The degree of the deoxygenation of the *organic matter* is the true index of the progress made in the formation of coal; and it is, at the same time, also the index of the efficiency of the fuel. For, other things being equal, the efficiency of the coal, as measured in B. t. u.'s increases precisely as the oxygen is eliminated, whatever the class of the coal" (page 318).

"Deoxygenation of the organic matter" is in no sense a mineralizing process. He implies in the preceding paragraph that it is a continuous process "passing from cellulose or lignose through the series of peats, lignites, subbituminous, 'bituminous,' and anthracite coals." These various coals must therefore be organic matter or "deoxygenation of the organic matter" would be impossible in them.

These extracts begin with the first page of White's article and end with the last, and could be multiplied, if necessary. But they are sufficient to show beyond question that the organic nature of the resulting coal is fully recognized.

At page 6 of the Government Supplemental Memorandum occurs the extract from Mr. White's article in which the words "organic" and "inorganic" have been interpolated, as already stated. This portion of the memorandum reads:

> "At page 311 of his paper, in closing the discussion of the first or organic stage, Mr. White says:
>
> "'In the preceding pages attention has been confined mainly to the initial stage of coalification, *i. e.*, the decompositon of the organic matter through the agency of micro-organisms, among which the anaerobic bacteria are primarily indispensable. This process, which is essentially *biochemical* (organic), probably leads no further than the formation of peats, humus, recent sapropelic deposits, humic concentrates, etc. It remains to consider the

second, or dynamo-chemical (inorganic) stage of coalification—the transformation, as the direct or indirect result of dynamic influences, of the coalifying material into lignite "bituminous" (humic) coals, anthracite, etc.' "

"NOTE.—The words 'organic' and 'inorganic' inclosed in parentheses in this quotation are inserted by the writer of this memorandum."

"Reading this quotation and the matter following on pages 312 to 318 in connection with the paper as a whole, it seems entirely manifest that in the author's opinion the bitumens, including both coal and petroleum, regardless of the character of the matter from which they are originally derived, are in the end the products of inorganic geochemical and geophysical forces. Quotations, therefore, which fail to direct the attention to the final or *inorganic* stage of the process, but which are confined solely to the author's discussion of the initial or *organic* stage, are signally misleading. The entire matter quoted in the Dumble appendix is from the discussion of the first stage found in the pages preceding page 311 of the original paper, and no part of it is taken from any portion of the discussion of the second stage."

A careful reading of Mr. White's article will show that petroleum is not once mentioned or even alluded to directly or by implication in the description of the second stage, beginning on page 311 under the subheading: "Part Taken by Dynamic Agencies in Coalification."

In this connection the Government's supplemental memorandum continues (pp. 7-8):

"The borrower of these quotations also passed over a significant paragraph almost immediately preceding the one he first selected, viz. (page 303):

" 'The ordinary process of coalification of an accumulation of organic debris embraces two stages of prime importance: (*a*) The putrefaction stage which is, at least dominantly, biochemical; and (*b*) the alteration or metamorphic stage, which is dynamo

> chemical, being induced and regulated, in the main, by geodynamic influences. The latter embraces phenomena ranging from pressure-dehydration and lithification, to graphitization.' "
>
> "Thus, even in his discussion of the initial or *organic* stage of the process, Mr. White outlines clearly the second or *inorganic* stage of dynamo-chemical alteration."

So far as petroleum is concerned, neither lithification nor graphitization have had any part in its production, as it is manifestly neither stony or graphitic. Moreover, pressure-dehydration in nature is no more a mineralizing agent than similar pressure in a cottonseed oil mill, nor has it in its action in producing petroleum done anything whatever to change it from an organic to an inorganic substance.

On page 311 Mr. White states:

> "There is little doubt in the mind of the writer that the oils and gases of the mesozoic and tertiary, as well as of the paleozoic, are directly derived, in most cases at least, from dynamic distillation of algal debris, though in part originally of animal origin."

He thus clearly and specifically removes the production of petroleum from the operations of such other processes (lithification, graphitization, etc.) included in or suggested by the above extracts, as might change it from an organic to an inorganic substance.

The Government's supplemental memorandum states (pp. 8-9):

> "Again, the appendix vouchsafes no indication of a certain important omission of substance occurring after the fifth quoted paragraph on page xvii. viz. (from White, p. 298):
>
> " 'The discovery of hydrocarbon-bearing strata composed largely of such organisms in rocks as old as the Ordovician strongly suggests an algal origin

for the graphites interbedded in still older metamorphic sediments of the Laurentian or Algonkian.'"

"Here Mr. White suggests the metamorphism induced by purely *inorganic* agencies, by which a substance of admittedly *organic* origin (algae or seaweeds) has been transformed into a well-recognized mineral substance—indeed, a mineral species (graphite)."

In this particular case Mr. White argues from the fact that large quantities of algal remains are found in less altered sedimentary rocks of Ordovician age, that the graphites interbedded in older and more strongly altered rocks may have been similarly algal remains transformed into graphite. In other words, that the organic matter (hydrocarbon) of the algae has been entirely dissociated and simply a part of one of the original elements (carbon) left as graphite, a recognized mineral. This is his phenomenon of "graphitization," which does not have any bearing on or connection with the production of petroleum.

The Government's supplemental memorandum closes the discussion of quotations of Mr. White's paper as follows (p. 9):

"As the result of similar selections and omissions the tendency of the quotations in the appendix is to give the impression that White wrote only of the organic phases in the evolution of petroleum and to instill the belief that he regards petroleum as wholly organic both in origin and in mode of derivation. This is wholly fallacious."

The reason Mr. White's discussion of the second or inorganic stage is not mentioned in the appendix is that Mr. White himself does not mention petroleum in it.

The Government's supplemental memorandum states (pp. 9-10):

"On pages xviii, xix, and xx the appendix quotes liberally from Mr. Clarke's work on the 'Data of Geochemistry,' as a basis for claiming support from

> that work for the proposition that petroleum is an *organic* substance, and, therefore, a nonmineral substance."

Dr. Clarke does not in any portion of the chapter on The Natural Hydrocarbons intimate in any way his belief that any of the processes taking part in the production of petroleum destroy its organic character or change it to a mineral substance.

This valuable article is, as it states, "a critical summary of what is now known," and Dr. Clarke, giving less attention to the various processes of derivation, confines himself principally to the materials from which petroleum has been derived, and simply illuminates his summary of the discoveries and theories of others by a question in one place and a suggestion in another, seldom making concrete statements of his own views.

Dr. Clarke says (pp. 697-8):

> "Engler himself ascribes the derivation of petroleum from animal remains to a putrefactive process, which removes the nitrogen compounds. The fats remain, to be altered by heat and pressure into hydrocarbons, whose boiling points lie below 300°; and these later undergo a partial autopolymerization into denser forms. How far such a polymerization may be possible, if indeed it is possible at all, is a matter of uncertainty. C. F. Mabery holds that the changes are always in the opposite direction, and that the more complex hydrocarbons are formed first, partially breaking down afterward into lower members of the series. J. Marcusson holds the same view. The putrefactive removal of the albuminoid substances is also to be questioned, and it is certainly not universal."

This is the part of the quotation claimed by the Government to have been omitted in the thesis. In it Dr. Clarke gives Engler's views and brings against their correctness the uncertainty that the polymerization is possible, the contrary

views of Mabery and Marcusson, and even questions a part of Engler's theory of the putrefactive process. The portions of this quotation italicized in the Government's supplemental memorandum (p. 10) are not Dr. Clarke's views, but Engler's. The thesis gives (appendix, p. xv) Engler's views in full from one of his latest statements. Hence, it was not thought necessary to repeat them in the quotation from Dr. Clarke:

> "This observation may be correlated with the views advanced by J. S. Newberry and S. F. Peckham, who regard the liquid petroleums as natural distillates from carbonaceous deposits, which latter were laid down at depths below the horizons where the oil is now found. The heat generated during metamorphism is supposed to be the dynamic agent in this process, although many productive regions show no evidence that any violent metamorphoses have ever occurred" (Clarke, p. 700).

This is another of the omitted quotations (see Supp. Mem., pp. 11-12). The views of Newberry and Peckham had been fully given earlier in the thesis (appendix, pp. xi-xiii), and it was deemed unnecessary to repeat them, especially as Dr. Clarke cast serious doubt on the supposed dynamic agent as suggested by them by his statement, "Many productive regions show no evidence that any violent metamorphoses have ever occurred."

The portions of the quotation omitted in the thesis and italicized in the Government's supplemental memorandum (pp. 11-12) are not stated by Dr. Clarke as his own views, but as those of Newberry and Peckham. Even were they his views, the distillation of petroleum from organic materials by dynamic heat would not render the petroleum inorganic, unless it were carried to the point of absolute destruction or dissociation of the hydrocarbons and the formation of graphite.

Dr. Clarke states, at pages 698 and 699:

> "F. Heusler also, while indorsing Engler's principal conclusions, invoked the aid of aluminum chloride as an agent in effecting a polymerization of the hydrocarbons. According to Ochsenius's theory, magnesium chloride was the active substance. These suggestions are of very little value, for the reason that the laboratory reactions with aluminum chloride are effected with the anhydrous salt, and not with its hydrolyzed aqueous solutions. It is not shown experimentally that the latter would be effective, nor does aluminum chloride occur in any notable quantity in natural waters. A more probable function of the salts, according to R. Zaloziecki, is to retard and modify the decay of animal matter on or near the seashore, and so to give time for its transformation into petroleum."

This is the only mention by Dr. Clarke of any possible mineralizing agencies in connection with the production of petroleum, and neither he nor the writers he quotes suggest that the action of these agencies has the slightest tendency toward mineralization of the petroleum. In the one case it is claimed that they act as agents in effecting a polymerization (which is in no way a mineralization), and in the other that they act as simple preservatives.

Dr. Clarke says further (p. 704):

> "By whatever class of reactions petroleum is generated, it doubtless appears first in a state of dissemination. How does it become concentrated? This question does not fall within the domain of chemistry, and cannot be properly discussed here. Probably circulating waters have much to do with the process, but whatever that may be, the laws governing the motion of liquids must inevitably rule. The oils must gather in proper channels, moved by gravitation, or by hydrostatic pressure of waters behind or below them, or by the pressure of dissolved and compressed gases, and they accumulate in porous rocks or cavities under layers of impervious material. When the latter are lacking, or when the hydrocarbons enter large areas of porous rocks, they may be

> either evaporated or rediffused. Pressure, temperature, viscosity, and the character of the surrounding rocks must all be taken into account, and each productive area needs to be studied independently with reference to its local conditions."

Without committing himself to the class of reactions by which petroleum is generated, he here outlines some possible methods of its concentration, but in no place does he even suggest that either in its formation or concentration the organic material is altered into an inorganic substance.

On pages 12-13 of the Government's supplemental memorandum the following statement is made:

> "At page xxi of the appendix the author, in contending that petroleum is an organic substance, observes:"
>
> " 'This has also been proven beyond dispute by the optical activity of petroleums, since only organic oils possess such quality' " (Clarke, p. 702).
>
> "An examination of page 702 of Clarke's 'Data of Geochemistry' fails utterly to support any such statement. Neither on that page nor elsewhere does Mr. Clarke use the expression 'organic oils.' The transposition of his reference to oil of 'organic origin' into the expression 'organic oils' is not justified at any point by Mr. Clarke nor by any authority mentioned in the appendix; neither does the most liberal construction of any authority cited in the appendix justify in the slightest degree the further statement on page xxi that 'even those who held strongly for its (petroleum) derivation from chemical reaction in which mineral matters were involved, recognized the resultant as an organic substance.' "

The fact that an oil of organic origin is an organic oil unless mineralized or rendered inorganic, which is not the case with petroleum, has been clearly brought out in this discussion. The further truth that "those who held strongly for its (petroleum) derivation from chemical reaction in which mineral matters were involved recognized the resul-

tant as an organic substance" is fully proven by the fact that in all their investigations of petroleum they used the methods of organic analysis.

On page 14 of the Government's supplemental memorandum is the following statement:

> "It should be noted that practically all the authors quoted by Mr. Dumble recognize the distillation or transformation (inorganic) process in connecting the organic substance into petroleum. The geodynamic processes to which the original organic materials have been subjected have resulted in new products which are inorganic."

The statement that petroleum in the process of its formation is subject to such radical change as transformation into an inorganic substance, or to any radical change in fact, is based on mere hypothesis. In the two articles which have been under consideration there is only one reference to direct observations on the production of petroleum. This is found in Dr. Clarke's paper, p. 699, and is quoted on page xviii of appendix:

> "E. Sickenberger has shown that in small bays of the Red Sea, where the salinity reaches 7.3 per cent, petroleum is actually forming as a scum upon the surface of the water. Living forms are abundant in these bays, and their remains, after death, furnish the hydrocarbons. The latter are to some extent absorbed into the pores of coral reefs, and so contribute to the formation of bituminous limestones. A still earlier publication by O. F. Fraas, contains data of similar purport."

Dr. Clarke quotes this and casts no doubt on the correctness of the observations, and here we have the observed fact of the direct formation of petroleum from organic matter on the surface of the earth without any intervention what-

ever of geodynamic forces. This is the only record of its actual production mentioned by either Clarke or White. If, then, petroleum can be and is actually produced on the surface, why call in outside and unproven action of geodynamic forces to account for it?

A careful comparison with the original publications of all quotations in the thesis as printed in the appendix, other than those from White and Clarke, reveals only two inaccuracies.

On page xiii the second quotation is not literal, although expressing the exact sense of original. The third quotation, beginning on that page, is verbatim from Dr. Orten's paper, "Report on the Occurrence of Petroleum, etc." Geol. Sur. Kentucky, 1891, pp. 43, 44, 45, and not from the paper in U. S. Geol. Sur., vol. 8, p. 494, as stated. The two papers, as noted in the statement of authorities on page iv of appendix, are, for the most part, identical in wording, as they are identical in meaning, but there are occasional differences in expression appearing in the print of said two reports (U. S. and Ky., *supra*) of the paper, but which in nowise alter the meaning.

As regards the quotations from the papers of Mr. White and Dr. Clarke, the only error occurring in the appendix is in the quotation from Dr. Clarke at the middle of page vi, where, through clerical error, three words have been omitted. The sentence, instead of reading, "The organic origin of petroleum, however, seems supported, etc.," should read, "The organic origin of petroleum, however, seems *to be best* supported, etc."

In no other instance is there a difference of a word in the quotations as given, nor, it is respectfully submitted, are any of the quotations arranged in such manner as to convey any meaning other than that conveyed by the full context of the paper from which they were taken, as herein above fully explained.

After the court's long acquaintance with the late Max-

well Evarts, it will not, we feel sure, believe that there was any intention to misrepresent the authors quoted, or in any way to mislead the court, nor do we believe that such misrepresentation has occurrred.

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No. 280.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

J. I. Lamprecht and F. M. Aiken, (Trustees),
Appellants,
vs.
Southern Pacific Railroad Company, (a corporation), Kern Trading and Oil Company, (a corporation), and T. S. Minot;
Appellees.

Brief on Behalf of Appellants on Questions of Law Certified by the Circuit Court of Appeals for the Ninth Circuit.

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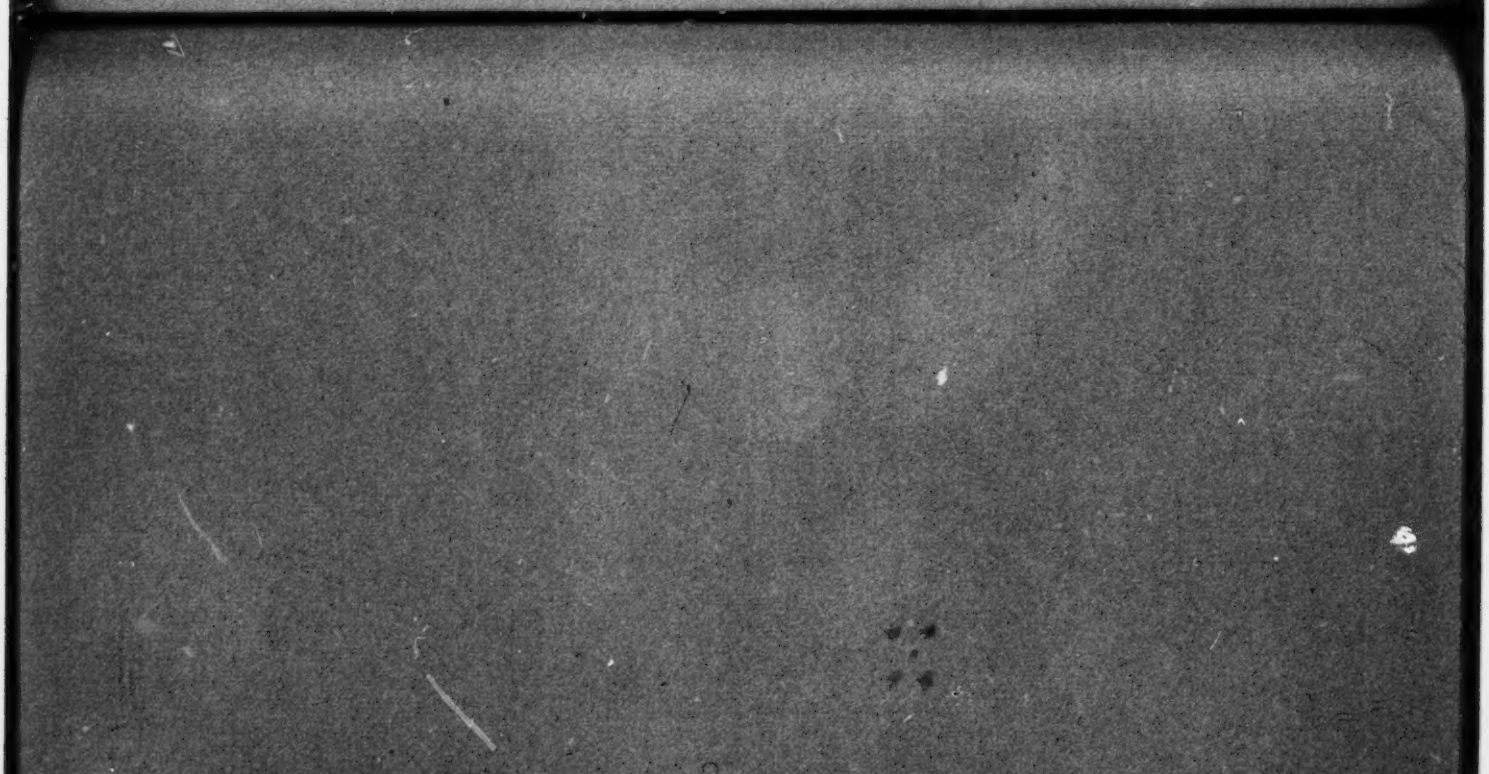

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

J. I. Lamprecht and F. M. Aiken, (Trustees),
Appellants,

vs.

Southern Pacific Railroad Company, (a corporation), Kern Trading and Oil Company, (a corpopation), and T. S. Minot;
Appellees.

Brief on Behalf of Appellants on Questions of Law Certified by the Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS.

This cause comes into this court by certification of certain questions of law by the Circuit Court of Appeals for the Ninth Circuit, upon its own motion, under the provisions of the judicial code (Sec. 239, Act of March 3rd, 1911). The certificate sets forth the facts upon which the questions of law are certified and reads as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

EDMUND BURKE,

Appellant,

vs. No. 1981

The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation),

Appellees.

and

J. I. Lamprecht and F. M. Aiken (trustees),

Appellants,

vs. No. 2028

The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation) and T. S. Minot,

Appellees.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that The Kern Trading and Oil Company, a corporation of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by

Congress on July 27, 1866 (14 Stats. 292), and the Joint Resolution of Congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by Congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and

application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

That under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any

physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas J. I. Lamprecht *et al.*, who were defendants to said bill, filed a cross-bill in said cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and Joint Resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said Act of Congress and Joint Resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part of any thereof."

And whereas the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court

holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted in this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and affect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court on appeal three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions, the following questions are hereby certified to the Supreme Court of the United States for its decision:

First: Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

Second: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without

any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Third: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Fourth: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

Fifth: Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of Congress reserving mineral land from the railroad land grants?

Sixth: Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.

Seventh: If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company,

and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge;
WM. W. MORROW,
Circuit Judge;
CHAS. E. WOLVERTON,
District Judge.

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, under Section 134 (239) of the Act of Congress of March 3, 1911, certifying certain questions to the Supreme Court of the United States. Filed April 1, 1912. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

I.

The parts of the act which specify the terms and conditions of the grant read as follows:

"Sec. 3. And be it further enacted, that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; * * * provided, further, that all

mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof may be selected as above provided;

"And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; * * *"

The fourth section of said Act of Congress, which provides for the issuance of patents under the grant, reads as follows:

"Sec. 4. And be it further enacted, that whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been

constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

"Sec. 18. And be it further enacted, that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have the uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for."

Congress also passed a joint resolution approved June 28, 1870, which reads as follows:

"Be it resolved, etc., that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by

the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July twenty-seven, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seven, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

The Commissioners of the General Land Office, in conformity with the rulings and decisions of the Interior Department which were then in full force and effect, and which had been followed by the officers of that department in such cases for 40 years, recommended to the then Secretary of the Interior as follows, to-wit:

"It is hereby recommended that the tracts described" (in said list) "covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act as aforesaid to the said Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may be issued 'all mineral lands' should any such

be found in the tracts aforesaid; but this exclusion, according to the terms of the statute, shall not be construed to include coal and iron.

G. W. LAMOREAUX,
Commissioner."

And the then Secretary of the Interior approved said recommendation as follows:

"Approved; covering 440,900.85.

HOKE SMITH, *Secretary.*"

ARGUMENT.

As the proper answers to all of the questions certified are determined by rules established by this court in the construction of the statute, we shall show what those rules are and then by reference to them (see page ..) the court may be assisted in answering the questions.

THE STATUTORY GRANT, BEING IN PRAESENTI, PASS THE TITLE GRANTED AS OF ITS DATE UPON THE FILING OF THE MAP OF DEFINITE LOCATION OF THE ROAD, OF ALL LANDS GRANTED BY IT, AND OF NONE OTHER.

This proposition is so thoroughly established by the decisions of this court that nothing more than citations of the authorities is necessary to sustain it; but in this case the question is, To what lands the title granted attached, and as the language of the authorities, read in connection with others which will be cited, reveals the answers to the questions propounded by the court, we will quote:

> Schulenberg v. Harriman, 21 Wall. 44, 60:
>
> "That the Act of Congress of June 3rd, 1856, passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, *'that there be and is hereby granted* to the state of Wisconsin' the lands specified."

In Leavenworth etc. R. R. Co. v. United States, 92 U. S. 733, 741, this court said:

> "It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation and import a grant *in praesenti*. This court has held that they can have no other meaning and the land department, on this interpretation of them, has uniformly administered every similar grant. Railroad Co. v. Smith, 9 Wall. 95; Schulenberg v. Harriman, 21 *Id.* 60, 1 Lester 513; 8 Opin. 257; 11 Id. 47. They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the parcels selected as if it had specifically described them."

In Missouri, Kansas etc. Railroad Co. v. Kansas Pacific R. R. Co., 97 U. S. 491, this court said:

> "As between the United States and the plaintiff, the right of the latter to patent became perfect on approval by the President of the report of the Commissioners. The Act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is 'There be and is hereby granted' to it the odd sections mentioned,—words which import a grant *in praesenti*, and not one *in futuro*, or the promise to grant. * * * When the location (of the road) was made and the sections granted ascertained the title of the plaintiff took effect by relation as of the date of the act, except

> as to the reservations mentioned; the act having the same operation upon the sections as if they had been specifically described in it."

"The reservations mentioned" are of lands not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the date of the location of the road.

In Railroad Co. v. Baldwin, 103 U. S. 426, 429, this court said:

> "The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in praesenti*. The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operations by the clauses mentioned. This is the construction given by this court to similar language in other acts of Congress. Missouri, Kansas etc. R. R. Co. v. Kansas Pacific R. R. Co., 97 U. S. 491; Leavenworth, Lawrence & Galveston R. R. Co. v. U. S., 92 *Id.* 733."

"The clauses mentioned" which are here held to reserve lands from the operations of the act are those which except lands sold, reserved, homesteaded and pre-empted.

Again in St. Paul and Pacific R. R. Co. v. Northern Pacific, 139 U. S. 1, 5, 6. This court said:

> "As seen by the terms of the third section of the act, the grant is one *in praesenti;* that is, it purports to pass a present title to the land designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is: 'That there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, and not a promise to transfer one in the future.
>
> "The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.
>
> "This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, Lawrence etc. R. R. Co. v. U. S., 92 U. S. 733."

It will be noticed that in none of the cases above quoted is the exclusion of mineral lands from the operations of the act raised, and that these cases uniformly hold that the title vested *in praesenti*, upon the definite location of the road as of the date of the granting act, to all the odd numbered sections within the primary limits of the grant which had not, prior to the location of the route been reserved, sold, granted or otherwise appropriated and which were free from other claims or rights. The records of the Land Office would at all times show what of the lands within the limits of the grant were excepted from it for those reasons, because a complete record of them was required by law to be made and kept in the Land Office. But there was another class of lands excluded from the operations of this act, and it was, in the very nature of the situation, impossible to make or keep a complete record of them before the company's title would attach to the odd sections; and this brings us to a second proposition which has been clearly established by the decisions of this court, viz.:

II.

The Exclusion, by the Statute, of all Mineral Lands from Its Operations, Being in Praesenti, Excluded from the Grant, in Its Creation and by Its Definition, All Mineral Lands, Whether Known or Unknown to Be Such.

This phase of the grant was considered by this court in Barden v. Northern Pacific, 154 U. S. 288. That was a case in ejectment by the railroad company against mineral locators. Plaintiff claimed under the Northern Pacific grant, Act of July 2, 1864, c. 217 (13 Stats. 365), the land was included in a list of selections which had been approved by the officers of the local land office and by the Secretary of the Interior for patent, before mineral was discovered in the land, as lands inuring to the railroad company under its grant after the road had been built and accepted. No patent had issued.

The contention of the railroad company was that the clause "That all minerals be, and that the same are hereby, excluded from the operations of this act," applied only to lands which were known at the date of the grant, to be mineral. In that case the court held, page 213:

> "It is also true that the grant was one *in praesenti* of lands to be afterwards located. * * * It would not be known where they would fall until the line of the

road was established; then the grant attached to them, subject to certain specified exceptions; that is the sections or parts of sections which had been previously granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of were excepted, and the title of its other sections or parts of section attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by condition annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant. The location of the sections and the exceptions from other causes in no respect affects that one or limits its operations."

The court then points out that Congress has power to make a statutory grant and to reserve thereby mineral lands, whether known or unknown, and that knowledge or lack of knowledge of the mineral character of the lands excluded and reserved could in no way have the effect of bringing them within the terms of the grant, which expressly excluded them from its operations. The opinion then points out that in the cases of St. Paul and Pacific R. R. Co. v. Northern Pacific Company, 139 U. S. 1, 5, and Desert Salt Co. v. Tarpey, 142 U. S. 241, 247:

"It was never asserted or pretended that they decided anything whatever respecting

> mineral but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was that title? It was of the lands which *at the time of the grant* were not reserved as minerals, and of the lands which *at the time of the location* had not been sold, reserved, or to which a pre-emption of homestead right had not attached." Pages 314, 315. (Italics ours.)

In this connection the court points out that in cases where conveyances except, exclude or reserve from their transfer of title minerals, mines or quarries contained in the lands described in them, such exceptions, exclusions and reservations are universally held valid whether the minerals so withheld from the conveyance are, at any time, known or unknown. Then, to explain that the exclusion of all mineral lands from the grant must be held effective as to unknown mineral land, the court says:

> "And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any severable products thereof, whether mineral or quarries contained therein, and whether known or unknown; yet, such must be the contention of the plaintiff or its contention will fall to the ground." Page 115.

Then, to emphasize that there is no reason why the exclusion of all mineral lands from the operations of the statute should not continue to

be effective after the identification of the odd section, the court says:

> "If one were to sell land, reserving therefrom the minerals of gold and silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold, the reservation of the minerals then undiscovered would be eliminated? Would anyone uphold the reasoning, or the doctrine, which would assert such a conclusion? And can anyone see the difference between the case now before us and the one supposed?" Page 115.

Again, in the Barden case, speaking of the ruling of the court in the St. Paul and Pacific Co. v. Northern Pacific Co., 139 U. S. 1, 5, and Desert Salt Co. v. Tarpey, 142 U. S. 241, 247, and other cases of similar import, the court says:

> "In none of them was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of the minerals then undisclosed. The grant did not exist without the exceptions of minerals therefrom, and Congress has declared, in positive terms, that the act shall not be construed to embrace them, and there is nothing in any of the cases cited in the plaintiffs' contention which indicates in the slightest degree that the original exception was subsequently qualified.
>
> "It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not

merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral *at the time of the grant,* and also those which were not reserved, sold, granted or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd sections nearest the line of the road might be selected. There is in our judgment a fundamental mistake made by the plaintiff in the construction of the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited, were specifically reserved to the United States and excepted from the operations of the grant. Mineral lands being *absolutely reserved from the inception of the grant,* Congress further provided that *at the time of the location of the road* other lands should be excepted, viz., those previously sold, reserved or to which a homestead of pre-emption right had attached." (Italics ours.)

The language of the court in that case is susceptible of but one interpretation, viz., *that Congress by the granting act created, defined and conveyed a title which, by reason of its very nature, could not attach to any mineral lands.*

Whether or not such a grant could be lawfully made or such a title be lawfully created under the common law, *or under the provisions of other statutes,* is of no importance in this case. Congress is a lawmaking body and the Constitution entrusts to it exclusively the making of laws, rules and regulations respecting the public lands, and it can create any kind of a title or make any kind of a grant it desires of them. This leads us to another proposition established by the ruling of this court.

III.

The Granting Act Is a Special Statutory Law, Intended and Designed by Congress Exclusively to Define and Control the Grant Made by It, and Must Be So Construed as to Carry Its Intent and Purposes Into Effect.

All grants of public lands to states and corporations to aid in the construction of railroads have been made by special Acts of Congress. In no instance has a general statute been passed authorizing any officers to grant any lands for such purpose. This circumstance and the fact that all such grants are made *in praesenti* show, beyond question, that Congress has always been unwilling to entrust to executive or administrative officers the making of such grants under prescribed rules and regulations. Congress has always held firmly to the policy of treating such grants as a subject requiring its special consideration and special legislation, because it did not deem it wise that the rules of law derived from construction of general statutes providing for the disposition of public lands by patent should be applied to railroad grants. There is no other possible explanation of the uniform policy of Congress on this subject. It must be remembered that Congress made this grant by special statute, which is the law of the case, and which withholds from all administrative, executive and

other officers all authority to grant any land under or by virtue of it. It expressly withholds from its conveyance all mineral lands, whether known or unknown, and its plain provision, designed and intended for that purpose, has been, ever since its approval, and is now, and will be until abrogated, the law on the question involved in this case, viz.: Did the railroad company acquire title to a billion dollars' worth of mineral land by or under this statute which states that it shall acquire no mineral lands by or under it? It cannot be denied that Congress exercised an exclusive power in making this grant, for in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 504, this court said:

> "The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property of the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. VanBrocklin v. State of Tenn., 117 U. S. 151, 168."

Nor can it be denied that the provisions of the statute which withhold all mineral lands from its conveyance must be liberally construed in favor of the public and full effect given to those provisions, because the granting act is a law as well as a conveyance. In Missouri, Kansas etc. Railroad Co. v. Kansas Pacific R. R. Co., 97 U. S. 491, this court said:

> "It must always be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of a common law which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power of identification exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

In Barden v. Northern Pacific, 154 U. S. 288, 319, this court in speaking of the Northern Pacific grant, said:

> "To incorporate the term 'known' into the act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed."

And on page 321 of the same opinion, speaking of the same grant, the provisions of which are the same as the provisions of this grant, the court said:

"The language of the grant to the plaintiff is free from ambiguity. The exclusion of all mineral lands from its operation is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants would compel a construction favorable to the grantor."

And again, on page 325 of the same opinion, the court says:

"In Leavenworth Railroad Co. v. U. S. 733, this court said: 'The rules which govern the interpretation of legislative grants * * * apply as well as grants of lands to states, to aid in the building of railroads, as to grants of special privilege to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to undertake. * * * If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor.'"

And:

"In Winona etc. Railroad Co. v. Barney, 113 U. S. 618, 625, speaking of the construction of legislative grants, the court said:

"'They are to receive such a construction as will carry out the intent of Congress, however difficult it may be to give full effect to the language, if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condi-

tion of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.'"

It would seem that the cases already cited would be sufficient to warrant the court in answering all the questions in the certificate adversely to the contentions of the appellees, but, as in the court below they claim to derive title from some source other than the granting act, we will show that such claims are without foundation because:

IV.

The Grant in Praesenti, Contained in the Granting Statute, and in the Definition and Creation of Which Both Known and Unknown Mineral Lands Are Expressly Excluded, Is Appellees' Only Source of Title.

Because:

1. *Neither the granting act nor any other statute confers upon any officer authority to grant any lands to the grantee named in the granting act.*

2. *The office of the patent provided for in the statute is not to make a grant of lands, nor to alter in any particular the grant made by the statute, but is to confirm to the grantee "the right and title" granted to it by the statute.*

3. *The statute contains no provision which expressly or by implication obliges the officers of the Interior Department to segregate the mineral from the non-mineral lands contained in "said lands situated opposite to and coterminus with" the completed sections of the road before issuing patent therefor.*

4. *There is no reason for implying from the nature of the grant an intent on the part of Congress that the mineral lands should be segregated from the non-mineral before patent is issued.*

5. *The patent issued does not show a determination by the officers of the Interior Department that all the lands described therein are non-mineral, but it shows that no such decision was made.*

6. *The presumption raised by a grant made by a patent issued under authority of a general statute, that the land so granted is of the character authorized by such statute to be granted, is not raised by a patent issued under the provisions of this granting act.*

7. *The Secretary of the Interior had the right to insert the mineral exception clause in the patent:*

(a) *By virtue of his discretionary powers.*

(b) *Under the express provisions of the joint resolution of June* 28, 1870.

(c) *Under the statements of this court in the Barden case and other authorities.*

(d) *Under the Joint Resolution of January* 30, 1865.

1. It cannot be said that the officers of the Interior Department possess any power or authority, except that given to them by acts of Congress, to grant lands to railroad companies to aid in the construction of their road, nor that any general statute gives them such authority. It must be admitted that if those officers ever had any authority to grant these lands to this railroad company, such authority must be found

in the fourth section of this special granting act or in the joint resolution of June 28th, 1870, which provides for the issuance of patent to the company under the act which makes the grant.

Did Congress intend in making a private grant *in praesenti*, of public lands, by special statute, to authorize the executive or administrative officers to add to that grant or to change, in any manner or by any means, the grant or the nature of the title so carefully defined, created and vested by its special statutes? It is absurd to contend that it did, especially when the provision of the fourth section for the issuance of the patent states, that upon completion and acceptance of a section of twenty-five consecutive miles of the road "*patents* of lands, *as aforesaid*, shall be issued to said company, *confirming to said company the right and title to said land situated opposite to and coterminus with said completed section* of said road." And that as fast as the additional twenty-five mile sections are completed and accepted "patents shall be issued to said company *conveying* the additional sections of land *as aforesaid*."

2. There is nothing in this language authorizing the officers of the Interior Department to add to or alter the grant made by the third section of the act. It expressly states that the patents are for the purpose of "confirming to said company the right and title to said land

situated opposite to and coterminus with the completed section of said road." And that patents shall be issued *"conveying* the additional sections of land *as aforesaid."* The words "confirming" and "conveying" are used in this section to signify the same thing. There is no reason for believing that Congress intended to convey by the statute title to lands opposite one section of the road and give executive officers authority to convey lands opposite all other sections of the road. It will also be noted that patents, "as aforesaid," are to be issued and that they are for the purpose of *conveying* the additional sections "as aforesaid."

The decisions of this court have settled the construction of this language beyond controversy. In Missouri, Kansas and Pacific R. R. Co. v. Kansas Pacific R. R. Co., 97 U. S. 491, Railroad Co. v. Baldwin, 103 U. S. 426, this court said:

> "It is contended that they (the words making a grant *in praesenti*) are qualified and restricted by the provisions of the fourth section, that whenever twenty-five consecutive miles of the road are completed in good substantial and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued 'confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road.' This provision, it is urged, is

inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with the completed section but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title as deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possessions. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. *The previous grant or confirmation is in no respect impaired thereby or its construction affected.* On this point see Langdeau v. Hanes, 21 Wall. 521; Wright v. Roseberry, 121 U. S. 488, 297." (Italics ours.)

This language was quoted and reaffirmed in Desert Salt Co. v. Tarpey, 142 U. S. 240, 247. It being true as the court said, in speaking of the office and effect of the patent that:

"The previous grant (in this case made by the statute) is in no respect impaired thereby or its construction affected," it is difficult to perceive how the patent can be held to grant or convey anything not granted or conveyed by the statute

or how it can be held to grant and convey what the statute had already granted and conveyed. It is entirely clear that the sole office of the patent is to confirm "the right and title" granted by the statute. "And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location, had not been sold, reserved, or to which a pre-emption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold and silver found therein, and should tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold the reservation of the mineral then undiscovered would be eliminated? Would anyone uphold the reasoning, or the doctrine, which would assist such a conclusion? And can anyone see the difference between the case now before us and the case supposed?"

Barden v. Northern Pac., 154 U. S. 315.

Such is the "right and title to said lands situated opposite to and coterminous with said completed section of said road," which this court has held the patent is intended to confirm.

3. The statute contains no language which can be construed as a specific direction to the officers of the Interior Department to segregate

the mineral from the non-mineral lands, and to mention in the descriptive part of the patent only non-mineral lands. In the absence of such specific provision in the statute, which is special, the only safe and reasonable way to confirm the right and title granted is to carry into the patent the clause excepting and excluding mineral lands. Such is the construction placed upon all railroad land grants for forty years, by all Secretaries of the Interior after administration of them was commenced by the Interior Department; and that this practice has been and is absolutely just to the railroad companies claiming under those grants, and that any other practice would result in giving to the grantees mineral lands of enormous value, which Congress has in these acts said they shall not have, will appear from an exposure of the fallacy of the railroads' favorite argument in trying to induce courts to award them mineral lands under these same grants.

4. We have purposely quoted a second time the language last above taken from the Barden case, because a careful consideration of its import and the absolute correctness of its logic will remove all difficulty this court may encounter in establishing, in this case, a rule which will settle, for all time, with absolute justice, the apparently troublesome question of administering these grants so as to avoid violation of the

acts of Congress which make them, by allowing mineral lands to pass by their operations.

The language last above quoted from the Barden case has been severely but erroneously criticised, not only by the dissenting opinion in that case at page 341, but also by counsel for appellees in this case in the courts below. These criticisms attempt to draw a material distinction between the effect of a conveyance which in terms withholds from its transfer all unknown minerals, mines and quarries in the lands described in it, and a conveyance which in terms withholds from its transfer all of such portions of the lands described in it as contain mineral. The argument and conclusion sought to be deduced from this alleged distinction are that, since in the case of the former type of conveyances, which has been in common use between private individuals for a century, or more, no part of the land itself, but only the unknown minerals, mines and quarries therein are withheld, that therefore, the withholding of them in no way prevents the identification of the property transferred; while, it is claimed, in the latter type of conveyances, all of those portions of the land itself, which contain unknown mineral, are withheld from the transfer, and that therefore the grantees are and always will be unable to identify the lands conveyed to them, unless there shall be designated and fixed a time at which and a

means by which the exclusion of all mineral lands from the grant shall become inoperative as to lands not then known to be mineral.

This alleged distinction is without a difference to sustain it. The argument deduced from it is pure sophistry; and the conclusion which it asserts is asserted to gain for the railroad companies a special privilege, not intended to be given by its grant,—a privilege uniformly denied individuals who have accepted similar grants; a privilege which, if extended to this grantee, will result in vesting in it title in fee to millions of dollars' worth of public lands which the statute forbids to pass by its grant. We say this because:

First. Unknown minerals, mines and quarries are as much a part of the lands described in the deed which withholds them from its transfer as the parcels of unknown mineral lands in the odd sections, within the limits of this grant, are a part of those odd sections.

Second. The private individual who accepts a deed which withholds from its transfer unknown minerals, mines and quarries is no more able to know what portions of the ground described in that deed are withheld from his ownership by its terms than this railroad company is able to know what portions of the odd sections within the limits of its grant are withheld from its ownership by the terms of its grant.

Third. It is as inconvenient for the individual who has accepted such a deed to be uncertain as to what particular portions of the ground described in his deed he owns as it is for the railroad company which has accepted this grant, which withholds from its transfer all mineral lands, to be uncertain as to what particular portions of said odd sections it owns.

Fourth. It would be as convenient, and proportionately as profitable, for the private individual, who has accepted such a deed, to establish, through sophistry, his title to the unknown minerals, mines and quarries withheld from the transfer of the deed to him as it would be for the railroad company, which has accepted this grant, to establish by like means its title to the mineral lands withheld from the transfer of this grant to it.

Fifth. It would be as just to the grantor who has executed and delivered such a deed, if a court should fix a time at which and designate a means by which the provisions of his deed withholding from its transfer unknown minerals, mines and quarries shall become unoperative to such of them as are then unknown as it would be to the United States for this court to fix a time at which and designate a means by which the provisions of this grant withholding from its transfer unknown mineral lands shall become

inoperative as to such of them as are then unknown.

Sixth. The individual who has accepted such a deed can mortgage, sell and convey the identical title which he received of the property described in the deed which he accepted, and individuals are doing this very thing every day all over the United States, and the purchasers know the kind of title they buy and accept, and none of them think of complaining of uncertainty in their titles, and the courts would not grant any relief if complaint were made to them on the ground that such conveyances create uncertainty in land titles. This same railroad company can mortgage, sell and convey the identical title which it received of the property described in the grant and the patent which it has accepted, and it has done so in thousands of instances in the state of California, and the purchasers know the kind of title they buy and accept, and none of them think of complaining of uncertainty of land titles because the records tell them exactly what that title is.

Seventh. The individual who has executed and delivered such a deed can sell and convey to the grantee therein named or to any other person any or all of the property which that deed withholds from its transfer, and no one is injured. The United States can, pursuant to the acts of Congress, dispose of the property which

its grant to this railroad company withholds from its transfer, and no one is injured.

There is not a single consideration which can be urged for holding that the exclusion of unknown mineral lands from this grant shall, at some time and by some means, to be designated by the court, cease to be operative as to lands then unknown to be mineral which cannot be urged, with equal reason and equal force, for holding that the exclusion of unknown minerals, mines or quarries from transfer of deeds shall, at some time and by some means, to be designated by the courts, cease to be operative as to such of them as are then unknown. Nothing, therefore, can be gained by these appellees from any argument based on a supposed uncertainty in land title, nor can it be said that it will be contrary to public policy to continue in force this exclusion of mineral lands from this grant, because:

First. Courts have universally held that it is not contrary to public policy to continue in force such provisions in deeds to individuals. And

Second. The public policy of a state or nation is learned from its laws and not from the sophistry by which a corporation is endeavoring to gain title to a billion dollars' worth of mineral lands, which the act of Congress under which it claims forbids it to take. The simple fact that this excluding clause is *in the statute* makes its

enforcement, for all time, the public policy of the United States, and that policy is not affected by the fact that these appellees regret that it is in the statute, and object to its enforcement as inconvenient and unprofitable to them.

But, consideration of public policy in this matter extends far beyond and above a mere question of land titles. Nothing is so deplorable in the affairs of a republic as lack of its people's confidence in their governmental officers and institutions. Nothing indicates more surely a nation's decay. If, therefore, questions of public policy are to be the basis of the decision in this case, it might be well to inquire what the people of this country will justly conclude if, by and under this granting statute, which provides that all mineral lands, both known and unknown, "*be* and that the same *are hereby excluded* from the operations of this act," the grantee has acquired title to public mineral lands worth millions upon millions of dollars because the statute, which is the law, is not the law.

But, it has been urged in this case in the court below, that because the granting act provides that, in lieu of mineral lands in the odd sections within the primary limits of the grant, "a like quantity of unoccupied, unappropriated, agricultural lands, in odd numbered sections, nearest to the line of said road, and within twenty miles thereof, may be selected as above provided,"

it is necessary to determine what of the primary lands are mineral in order that it may be known for what quantity of lands mineral-lieu selections may be made; and from this it is argued that, if such determination is not made, *by the government*, before patent is issued, but the determination is delayed indefinitely, all of the lands from which such lieu selections could be made will pass from the government, because no title to lieu lands attaches until selection is made, and that it will become impossible to get any lands in lieu of mineral lands excluded from the grant. These considerations are urged to induce the courts to construe the act to oblige the officers of the Interior Department to determine, before issuing the patent, what of the lands are mineral and to issue patents which will pass title to unknown mineral lands. To support this argument cases are cited in which this court has held that patents issued, granting lands under authority of general statutes, raise a presumption that the officers decided before issuing the patent that the land described in it was of the character authorized by such general statutes to be *granted by the patent*. From this appellees have asserted the conclusion that a patent having been issued in this case, the *issuance* of the patent "creates a conclusive presumption" or "is a conclusive adjudication" that all of the land described in the patent is non-mineral, and that

therefore, the Secretary of the Interior had no authority to insert in this patent the clause "yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands' "; and that therefore, this clause must be held void and the other parts of the patent valid, and to raise the presumption that all the lands described in it are non-mineral, and thus pass title to unknown mineral lands.

We have stated this argument at length in order that its fallacies may appear.

First. The granting act expressly puts upon the grantee the burden of selecting the land granted. All mineral lands are by the statute excluded from its grant. "Therefore they were not to be located at all, and if in fact located, they could not pass under the grant."

Barden v. Northern Pacific, *supra,* 316.

Second. If it was possible to determine, before the patent issued, what of the lands were mineral, the grantee could determine that fact and thus avoid the difficulty in locating its lands.

Third. If it was not possible to determine that fact before the patent issued, then there can be no merit in the contention that the government officers should perform the impossible task of then determining what of the lands were min-

eral, since the granting act does not specifically provide that they shall do so.

Fourth. The grantee is forced to admit, as a reason for claiming mineral lands under this grant, that it was impossible to determine, before patent should be issued under it, what of the lands were mineral. This is undoubtedly the reason why Congress, by special act, excluded *in praesenti* all unknown mineral lands from the grant, by a special provision in the statute, instead of depending upon the officers of the Interior Department to perform the impossible task of determining what of the lands were mineral before the time when the company's right to patent would become complete by the completion and acceptance of the road.

Fifth. The purpose of the patent being to confirm the grant made by the statute, and not to make another grant or to change in any particular the grant made by the statute, it was proper that the patent, which evidences the title granted, should contain notice that the grantee acquired no title to any mineral lands.

Sixth. The provisions of the statute which provide that title to lieu lands cannot attach before their selection is a limitation of the grant, intended for the benefit of the public, and should be strictly enforced and liberally construed in favor of the public. The statute informed the grantees that they could acquire no title to min-

eral lands under it. Had they been willing to obey the law by which their grant was made, instead of selecting mineral lands which, as in this case, were covered by mining locations, and depending upon the ingenuity of attorneys to induce courts to construe the statutes so as to give them title to mineral lands, which the statutes forbid, they would not now be before this court arguing their inability to select mineral lieu lands. They chose to risk an opportunity to make lieu selections for the hope of securing, in violation of the statutes, mineral lands a thousand times more valuable than the lands they were entitled to select, and cannot now complain of loss on the uneven chance, which they knowingly accepted, of securing values to which they knew they were not entitled. The sooner these railroad companies understand that these grants mean exactly what they state, and that no title to any mineral lands can pass to them by virtue of the acts or any patent issued under them, the sooner they will cease selecting and trying to acquire mineral lands under them. But so long as they are given hope that, by ingenious arguments, they can induce courts to adopt a strained construction of the statutes to overcome imaginary difficulties, and thus gain title to mineral lands which the statutes say they shall not have, and which are worth millions upon millions of dollars more than the land granted to them, just

so long will they accept this risk of slight loss for the hope of such enormous gain.

5. *Neither the patent issued nor the issuance thereof establishes an adjudication by the officers of the Interior Department that all of the lands described in the patent are non-mineral.*

In the Barden case, *supra*, which is the leading authority upon the exclusion of mineral lands from railroad grants, no patent had issued. There is therefore ample reason for this court to hold, if so disposed, that what was said in that opinion relative to the effect of patents issued under such grants, is *dictum*. The question there presented and determined was whether unknown mineral lands were included in the phrase "all mineral lands," and for that reason excluded from the grant. The determination of the effect of the issuance of a patent under the act was not necessary to the decision of the question presented, except that it was argued in that case by the railroad companies, that, if unknown mineral lands were excluded from the grant made by the statute, *the patent could not pass title to them;* that mineral might be found in the lands years after the patent had been issued and that this circumstance would create uncertainty in the title and render it impossible to identify the land granted,—an argument which, as we have seen, is without merit. What was said in the opinion in the Barden case relative to the effect

of the patent was in reply to that argument. In Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 508, this court said, in speaking of a prior decision:

> "The question in that case was not, for what deficiencies indemnity should be had, but what lands could be taken for deficiencies which exist. If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the act, it was mere *dictum* and not essential to the decision and therefore not authoritative and binding."

And, as this court said in Barden v. Northern Pacific, *supra*, 322:

> "It is more important that the court should be right upon more elaborate consideration of the case than consistent with previous declarations. Those doctrines will only eventually stand which bear the strictest examination and the *test of experience.*" (Italics ours.)

It would appear from the efforts of the appellees in this case to acquire title to mineral lands to the extent of millions of dollars, under what is said in the Barden case relative to the issuance of patent and the effect thereof, that if their construction of the opinion in that case is correct, its *dictum* will not "bear the strictest examination and the *test of experience.*"

We call attention to this situation, not because it is necessary to alter in any manner the ruling

in the Barden case or any declaration made in the opinion, in order to prevent the railroad company from acquiring titles to mineral lands here in controversy, but because the erroneous construction which appellees seek to place upon that decision is based entirely upon that portion of the opinion which may be properly regarded by this court as *dictum;* and it is not difficult to see how, under that *dictum,* the officers of the Interior Department may erroneously pass to the railroad companies, under these acts, by way of estoppel, title to unknown mineral lands which the act forbids to pass by or under it. That opinion states that, if the officers of the Interior Department *investigate the character of the land* before issuing patent and *decide that it is non-mineral,* and *state in the patent* which they issue *that it is non-mineral,* that such patents will pass title by way of estoppel, to unknown mineral lands described in the patent, and that the title so passed can be thereafter avoided only by direct proceedings brought for that purpose, wherein fraud, imposition or mistake must be alleged and proved. Such is the extent to which that opinion goes in suggesting a method whereby the railroad companies might possibly acquire title to mineral lands. But, as the grant is made by a special statute, which does not specifically authorize any officers to determine the character of the land before patent is issued, and which

must be strictly construed in favor of the public, it is difficult to understand why, in any case, those officers, from whom authority to grant land under the act was designedly and by its express terms withheld, should be empowered to pass, by way of estoppel, title to lands excluded from the operation of the act, and that they should do this by the exercise of the authority not conferred by that special act.

It is stated in that opinion that the duty of determining the character of lands granted by Congress is by law placed upon the officers of the Interior Department. This undoubtedly is true of most general statutes, under which grants are made *by patents;* but will anyone say that the provisions of such general statutes have superceded the provisions of this special act, in their application to the special subject on which they were specially designed to express the will of Congress?

The principle of law which decides this point has been fully explained by this court in Rogers v. United States, 185 U. S. 83, 87, where this court said in part:

> "'The general principle to be applied,' said Bovill, C. j., in Thorpe v. Adams (L. R. 6 C. P. 135), 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject,

or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald v. Champenys (30 L. J. N. S. Eq. 782, 2 Johns. & Hem. 31, 54), 'that the legislature having its attention directed to a special subject and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'

"In Black on Interpretation of Laws, 116, the proposition is thus stated:

" 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

" 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the

latter act such a construction, in order that its words shall have any meaning at all.'

"And in Crane v. Reeder, 22 Michigan 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that state, said:

" 'Where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone would include the same matter and thus conflict with the special act or provision the special must be taken as intended to constitute an exception to the general act or provision especially when such general and special acts or provisions are contemporaneous as the legislature is not presumed to have intended a conflict.'

"Both the text books and the opinion just quoted cite many supporting authorities.' "

The principle of law declared in that case makes applicable to this case the joint resolution of January 30th, 1865 (13 Stat. 567), which was passed by Congress for the sole purpose of reserving mineral lands from grants to states and corporations to aid in the construction of roads or for other purposes. It reads:

> "That no act passed at the first session of the thirty-eighth Congress, granting lands to states or corporations, to aid in the construction of roads, or for other purposes, or to extend the time of grant theretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved, exclusively to the United States, unless otherwise specially provided in the act or acts making the grant."

The reservation of mineral lands by this resolution is not confined to the lands affected by the grants specified as made by the thirty-eighth Congress. Its language is, "mineral lands, which *in all cases* shall be, *and are*, reserved * * *." This resolution has never been repealed, it is not inconsistent with the provisions of this granting act, its reservation is *in praesenti* and necessarily includes unknown mineral lands and it forbids any construction of this grant which will include mineral lands in its conveyance.

It is entirely clear that the powers, duties and authority given the officers for the administration of general statutes authorizing them *to grant lands by patents* have no application in their administration of this special statute, by which Congress did not leave to those officers the duty of granting land and excluding mineral land from the grant, but did itself exclude them by the granting statute which made the grant. If those officers have assumed to decide, for all time, the character of the land in odd sections before issuing patent, they have assumed an authority not conferred upon them by that statute, which is the only law applicable, and hence cannot, in the exercise of it, estop the government or those claiming through or under it.

But whatever the court may hold as to the possibility of those officers estopping the government by an erroneous decision as to the char-

acter of the land before patent is issued, to say that they can do so is one assertion; to say that the law of this grant compells them to attempt the admittedly impossible task of then determining the character of the land and by necessary failure in that task to work such estoppel, is quite another assertion; and to say that they have attempted, in this case, to decide the character of the land before issuance of patent, and made an erroneous decision in that regard, is still another and very different assertion.

In noting the way in which such estoppel could be worked, under the *dictum* in the Barden case, it will be advantageous to note also the supposed difficulty which confronted this court in deciding that case, and divided it, because what was there said relative to the issuance of patent and the conclusiveness of it as to the character of the land was stated in reply to an argument which presented that supposed difficulty, which we have shown to be without merit and foundation.

When that case came before the court it was irrevocably committed to the following propositions in construction of railroad land grants:

1. That the railroad grants were grants *in praesenti,* and that they passed a present title as of the date of the grant to all the land granted by them, upon the definite location of the line of the road. Such had been the uniform rulings of this court in many cases.

2. That a patent issued under the provisions of a railroad grant neither grants nor conveys anything, but is only convenient evidence of the grant made by the special statute.

3. That in case of grants made by patents issued under general statutes, a decision by the officers of the Interior Department of all questions of fact necessary to entitle the applicant to the land, was necessarily prerequisite to the making of the grant *by the issuance of the patent*, and that, therefore, the grant having been made, the patent, which was a perfect record of the grant, precluded any collateral inquiry as to the character of the lands described in it.

The court was confronted with these previous rulings in considering the exclusion *in praesenti* of all mineral lands from the operations of the granting act, and this excluding clause of the statute was direct, positive and unqualified. The difficulty was to give effect to this exclusion clause, in accordance with the plain intent of the statute, and not overrule the cases which held that the statute passed a present title, and that the patent in no way changed the grant made by the statute.

The minority of the court sought to reconcile the apparent conflict by conceding that only lands known at the date of the grant to be mineral were excluded therefrom. Their reason for this was *that the patent cannot change the grant*

and that, if lands not known to be mineral, at the time of the grant could be claimed by citizens when they afterwards turned out to be mineral, then the question of the character of the land could never be settled, and the title would always be uncertain.

Mr. Justice Brewer stated tersely, in his dissenting opinion, at page 335 *et seq.*, the difficulty which confronted the court in Barden v. Northern Pacific, *supra,* when he said:

> "But it is said that Congress never meant that this vast mineral wealth should pass to this corporation, and that the individual must contract with that corporation for the purchase of any mine, and yet with a strange inconsistency, as it seems to me, before the opinion is closed it is declared, *in effect,* that Congress meant that when the President should issue a patent, the mineral wealth, vast as it is supposed to be, should then pass to the corporation. *If Congress by its legislation excluded mineral lands from the scope of this grant, then surely no executive officer is authorized to convey mineral lands, and even the patent of the President passes no title thereto.*" (Italics ours.)

That is both logic and law.

On page 226 of the opinion in the Barden case, the court says:

> "The earnest contention of the counsel for the plaintiff arises principally, we think, from the unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of

> the government is not limited to *known* mineral lands, the title, it is said, may be defeated years after the land has passed into the hands of the grantee and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that title to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals and the annoyance of the public."

What "uncertainty in the titles of the country" would be created, if this court should simply hold in this case, that the statute is the railroad company's grant, its only possible source of title, that the patent can grant nothing, that the statute excludes all mineral land, both known and unknown, and that they are therefore excluded, and that no title to any of them can pass in any manner whatsoever, because the statute, which is the law, forbids it and that this court must construe the statute to mean just what it says and nothing else? No uncertainty whatsoever could be created in land titles by such a ruling. It is a right of universal practice for grantors to withhold from their conveyances unknown mineral in lands and sufficient of the ground where the minerals may be found to enable them to develop the land and take out the mineral advantageously. This very railroad company is doing this same thing by deed every day in regard to

the lands claimed by it under this identical grant. If it prevails in its present contention as to the construction of the grant, the people, for whose benefit the unknown minerals in the land and what Congress deemed sufficient land to work them advantageously, were excluded from the grant, will soon own by purchase, the non-mineral lands and the railroad company will own the unknown mineral in the land and what it deems sufficient of the land to work it advantageously—all contrary to the express provisions of the statute,—which would be a fine compliment to the shrewdness of appellee's counsel, but a sad reflection upon the wisdom of our courts. As shown on page .... of this brief, there is absolutely no foundation for this claim of uncertainties in titles unless it be conceded that the railroad company is privileged to have applied to grants to it a different rule of law than that applied to the same grants to private individuals.

But in reply to the argument which created this supposed difficulty of uncertainty in the titles of the country, the opinion in the Barden case proceeds to point out a way of avoiding this supposed uncertainty, which the railroad company then complained of, for the purpose of acquiring title to mineral lands, which were excluded from its grant and the same uncertainty which it is now daily creating in the titles of the

same land for the sole purpose of keeping those same mineral lands which its grant states it can never own. The method designated by the opinion will appear from the following excerpts from it:

> "The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of the public lands of the United States and the adjustment of private claims to them under the legislation of Congress. It can hear contests and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear the evidence upon and determine the character of the lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law specifying that the lands are of the character for which patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to plaintiff provides for the issue of patent to the grantees for the lands claimed and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance." (Pp. 326-327.)
>
> "The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it

> in the instruments transferring the title of government to the grantees, reposes in the officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees were performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by the officers of the Land Department, charged with its preparation and issue, that the land is non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the Department, would be conclusive in subsequent proceedings respecting the title." (Pp. 330-331.)

The above quotations undoubtedly state the law relative to grants made by patent under authority of general statutes which authorize the officers of the Interior Department to grant lands; but to say that it is the law which controls this grant which Congress itself made *in praesenti* by special statute direct to the grantee is quite another matter, because:

First. "The law" which defines and controls this grant does not "place under the supervision" of the officers of the Interior Department "the control of all matters affecting the disposition of the public lands" granted by this act. The

statute itself expressly excludes these mineral lands from the grant and thereby removes from the supervision of those officers the control of the matter of excluding them from the grant.

Second. The patent provided for in the statute does not *convey* the land which had been already conveyed by the statute, neither can it convey any lands not conveyed by the statute, because the officers who issue it have no authority of law to convey, *under this statute,* any lands not granted by the statute; hence, the patent is in no sense a "conveyance" but its office is to confirm the right and title granted by the statute. (See *ante,* p. . . .)

Third. Under this special statute "the duty of determining the characer of the land granted by Congress and stating it in the instruments transferring the title of the government to the grantee" *does not* repose in the officers of the Land Department because:

(a) The special statute does not place that duty upon those officers. (*Ante,* p. . . .)

(b) "The instrument transferring the title of the government to the grantees," can be none other than the statute, because the statute itself transfers the title of the government to the grantee, as held by this court in a multitude of cases, and no one will assert or pretend that those officers have any right or power to change that statute in any regard.

These observations indicate some of the inconsistencies into which these statements of the opinion in the Barden case, which the court is at liberty to regard as *dictum,* may lead the court. There is but one way to avoid these inconsistencies and that it to hold that the statute which is the law, *has excluded* all mineral lands, both known and unknown, from the grant, and that they are, therefore, excluded for all time, unless Congress sees fit, in its wisdom, to change the statute. Such is the rule universally applied to similar grants between individuals. Why should it not apply to this railroad company, especially since its conveyance is the *law of its grant,* and not dependent for its validity, according to its import, upon rules of the common law or those derived from other statutes.

But even if the court wishes to consider itself bound by these statements in the opinion of the Barden case, yet, giving full force to those statements as the law of the state, the title to the lands here in controversy has never passed to the railroad company, because:

First. Under those statements three things are absolutely necessary to vest in the railroad company title to mineral lands under the grant:

(a) An examination by the officers of the department into the character of the land described in the patent;

(b) A finding by those officers, after such examination, that the land is non-mineral.

(c) A statement in the patent issued that the lands described therein are non-mineral.

And the court says:

> "Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff." (P. 330.)

And, that such patent, showing a decision by the officers that the land described in it is non-mineral, "would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title." (P. 331.)

But, the obvious answer to an attempt to apply such estoppel in this case is that it is alleged in the cross-bill and admitted by the demurrer and stated in the certificate of the judges certifying this case to this court:

(a) That the land in controversy is mineral land;

(b) That the officers of the department never made any investigation or examination into the mineral or non-mineral character of the land before issuing the patent;

(c) That those officers never decided that said land was non-mineral;

(d) That the patent issued contains no statement that said land is non-mineral;

(e) That since said patent issued those officers have examined said land and classified it all of record as mineral land;

(f) That the patent issued contains a clause in appropriate language purporting to exclude all mineral lands from the grant.

It is therefore admitted in this case that the patent does not "comply with the act of Congress in which the grant before us was made" to the Southern Pacific Railroad Company, and it cannot estop anyone who claims the land under the mining laws.

The court also said in the Barden case, p. 331:

> "The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, *without excepting mineral lands,* until it has had an opportunity to have the country, or that part of it for which patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

It is admitted in this case that no examination whatever was actually made of this land to determine its character before patent issued, and that the officers did, in issuing the patent, except mineral land by inserting the mineral exception clause in the patent. Therefore, under the above

language of the court, that exception is good and kept in the United States the paramount title to these mineral lands. If this last quotation is *dictum* the same is true of all that part of the opinion which speaks of the effect of issuing patent.

It is not difficult to understand why the court stated so carefully that to estop the government there must be a decision of the officers that the land was non-mineral and a statement of that decision in the patent. The necessity of this arises from the nature and functions of the officers of the Interior Department when it acts judicially in determining the character of lands under these grants and issuing patents for them. This leads to another proposition which is fatal to appellee's contention in this case, viz.:

THE APPELLEES CONFESSEDLY SEEK TO ESTABLISH, BY VIRTUE OF AN ERRONEOUS DECISION BY PUBLIC OFFICERS, THEIR TITLE TO PROPERTY WHICH CONGRESS INTENDED AND SPECIALLY DECLARED BY STATUTE THAT THEY SHOULD NOT HAVE, AND THEY MUST THEREFORE SHOW AFFIRMATIVELY FROM THE RECORD THAT SUCH ERRONEOUS DECISION WAS MADE.

In considering this proposition and the methods by which the making of such erroneous decision under the *dictum* of the Barden case might be established, it should be remembered that the

officers of the Land Department, acting under the direction of the Secretary of the Interior, constitute a special tribunal. When considered as such special tribunal it is inferior in the technical sense that it is not a court of general jurisdiction having full power to decide conclusively all questions of jurisdiction and all other questions of law arising in the course of its proceedings, although it acts judicially.

Smelting Co. v. Kemp, 104 U. S. 636-640;
Steel v. Smelting Co., 106 U. S. 447-450;
Barden v. Northern Pac., 154 U. S. 288-327-328.

In Grignons v. Astor, 43 U. S. 319, the court had under direct consideration the nature of inferior and superior tribunals, and the nature and conclusiveness of their judgments. In that case it was necessary for the court to examine and state the distinction between inferior courts of limited jurisdiction and superior courts of general jurisdiction, and the nature and effect of their respective judgments. At pages 340-41 the court speaking of the effect of judgments of superior and inferior courts said:

> "The granting the license to sell is an adjudication upon all the acts necessary to give jurisdiction and whether they exist or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom

it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree it can be impeached only by fraud in the party who obtains it. 6 Peters 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provision of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts in the technical sense of the term, because an appeal lies from their decision. That applies to 'courts of special and limited jurisdiction which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction'; that of the courts of the United States is limited and special and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Peters 205. They have powers to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless reversed on error or appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and

whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection beyond the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; *every requisite for either must appear on the face of their proceedings, or they are nullities.*"

It was this principle of law governing the proceedings of special inferior tribunals of limited jurisdiction which Justice Field had in mind when in the Barden case, *supra,* in speaking of what a patent issued under a railroad grant should contain, said:

"The fact remains that under the law the duty of determining the character of the lands granted by Congress, *and stating it in instruments transferring the title of the government* to the grantees, reposes in the officers of the Land Department. Until such a patent is issued, defining the character of the land granted and showing that it is non-mineral, *it will not comply with the act* of Congress in which the grant before us was made to plaintiff." (Italics ours.)

The officers of the Land Department have no jurisdiction, according to the *dictum* of that opinion, to issue a patent under a railroad land grant without inserting in such patent a clause excepting all mineral lands, unless they have previously decided that all the lands described in the patent are non-mineral. A decision by those officers that the land is non-mineral is necessary to their jurisdiction to issue patent which will evidence title to it in the grantee.

It is because the court recognizes that the Land Department, in deciding questions arising in its proceedings on the disposition of public lands, acts as a special *technically inferior* tribunal having limited exclusive jurisdiction, that it insists that the facts necessary to the passing of the title under the grant must appear upon the face of the patent itself. The wisdom and reasonableness of this rule will at once appear when we reflect that the findings of fact by the department are final and conclusive, because their jurisdiction to determine questions of fact is exclusive. They cannot, except for fraud, be controverted in any other tribunal having either original or appellate jurisdiction. If the law did not require the record of the proceedings of such inferior tribunal to show both jurisdiction and its lawful exercise by requiring every fact requisite for either to appear on the face of the proceedings, how could a court ever ascertain

whether such inferior tribunal having exclusive jurisdiction to decide questions of fact had misapplied or misconstrued the law under and in accordance with which it claimed to act?

The rule obtains that their decisions of questions of fact, based upon evidence, are final and conclusive, and if the record does not show what facts have been established and what have not been established, it would show nothing upon which any court could apply the law.

It is a well established rule that the erroneous decisions of questions of law by the departments are not binding on courts. Decatur v. Paulding, 14 Pet. 479. And in order to know whether or not the department has decided correctly or incorrectly any question of law arising in its proceedings, a court must know how it decided the questions of fact upon which the question of law arose. If the decision of such questions of fact do not appear upon the record it would be impossible to know how the law was construed or applied; so it has been settled beyond controversy that the records of the proceedings of technically inferior tribunals must show not only the facts upon which they presume to exercise their jurisdiction, but also the facts which will show whether or not they have decided correctly, in the exercise of that jurisdiction, the questions of law arising upon those facts.

The appellees are therefore confined to the

patent and to the records of the proceedings wherein it was issued to show affirmatively that the department erroneously found that the land was non-mineral, which records show affirmatively that no such decision was ever made.

The defendants claim, and the court below held, that the patent pleaded in this suit is in effect a judgment or decree of the Interior Department acting as a tribunal or court. We are willing to concede this contention because in such case the patent must be considered the decree or judgment either of a technically superior court of general jurisdiction or of a technically inferior court of special limited jurisdiction. If it be considered as a judgment or decree of a court of the former class, then:

> "If there is error in it, of the most palpable kind, if the court which rendered it have in the exercise of jurisdiction disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchases is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law."
>
> Grignon's Lessee v. Astor, 43 U. S. 340.

It is clear under this doctrine that even if the department be regarded as such superior tribunal of general jurisdiction, it having issued a patent which purports not to convey such of

the lands therein described as are non-mineral, *such patent remaining* and no appeal having been taken from it, the patent must be held valid according to its terms and import, which are due to the construction placed upon the statute by the tribunal.

On the other hand if the patent be considered as a judgment or decree of a court of the latter class, then every fact necessary to confer jurisdiction and also every fact necessary to show the correctness of the judgment or patent must appear of record in the proceedings wherein the patent was issued, or the patent is a nullity; and, not only is there no record that the department decided that this land was non-mineral, but both the patent and the record of the proceedings in which it was issued bear unmistakable evidence that no such decision was ever made. The bill alleges and the demurrer admits that the department never decided that the land was non-mineral, which decision was necessary to the attachment of the grant made by the statute; it was necessary to identify the lands as those of which title passed by the statute, and it not appearing of record in the proceedings wherein the patent was issued, the judgment or patent which concluded those proceedings is either a nullity or the exception of mineral lands is effective, because the statute confers no authority for the inclusion of mineral lands in the patent. The

patent states upon its face that neither the act of Congress under which it was issued, nor the patent itself taken in connection with the statute conveys any lands which are in fact mineral; so it makes no difference which horn of the dilemma the defendants take. A simple application of the law to the facts pleaded and admitted by the demurrer demonstrates that the defendants have no title to the lands in controversy in this suit. In other words, if the patent be considered as a final judgment of a superior tribunal having general jurisdiction it is valid as a whole and cannot be disputed. If considered as a final judgment of a special inferior tribunal of limited jurisdiction, *there appearing in the proceedings no finding that the land was non-mineral,* the tribunal had no authority in law to issue any patent thereof unless it had authority to issue a patent which would not pass title to any of the lands which might thereafter be found to be mineral. Even if the department had no authority to issue a patent containing this mineral exception clause, it is still true, *that it did not issue one which does not contain that clause,* and the patent recites no determination of the non-mineral character of the land, which determination was necessary to enable a court to determine, as a matter of law, whether it was within the power of the department upon facts found to issue a different patent, viz.: one pur-

porting to pass an absolute title to all the land described in the patent. Hence there was no foundation for the issue of such patent.

The appellees cannot be permitted in one breath to claim that the Land Department in issuing the patent, acted in the capacity of a superior court of general exclusive jurisdiction, and that its patent is therefore conclusive and final, and thus establish the validity of the patent or final decree, and then in the next breath to claim that the same department, in the same proceedings, acted in the capacity of a special inferior tribunal of limited jurisdiction, and that therefore they can, in this proceedings, impeach the validity of those parts of the patent or decree which prevents their title from attaching to mineral land, which both the statute and the patent state never passed to them. The rule governing these matters is that this patent is valid and effective according to its terms and import or is a nullity. Speaking of the effect of a judgment sale and confirmation on attachment by the Court of Common Pleas of Ohio, which was a superior court of general jurisdiction, the court said, in Voorhees v. the Bank of the U. S., 10 Peter 473:

> "A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law if it has been rendered by a court of competent jurisdiction of the parties the subject matter with au-

> thority to use the process it has issued; it must remain the only test of the respective rights of the parties to it, p. 474. * * * The line which separates error in judgment from the usurpation of power is definite; and is precisely that which denoted the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purported to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error, p. 475."

Again, in Wilcox v. Jackson, 13 Pet. 498, 511, the court, in speaking of the nature and effect of the final decisions of the tribunal, said:

> "Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable would render that inquiry wholly unavailing. It is this—that the acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of preemption—that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the

> judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of Elliott *et al.* v. Peirsol *et al.*, 1 Peters 340, in these words: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void.' "

Nothing could be clearer from the rulings of the court in these cases than that the patent pleaded in this suit must be held valid and effective according to its import, however erroneous may have been the construction of the law which induced the officers to issue it, unless it was issued without authority; that is, unless the officers have no jurisdiction or power to issue a patent which would evidence title to such of the land described in it as was non-mineral, and not to such of it as was mineral. It is clear from the patent itself that such is its import and, if the officers had no authority to make or issue such a patent, it is clearly a nullity; under these decisions there is no middle ground.

The Land Department acts as a special inferior tribunal in matters pertaining to the dis-

position of the public lands. Its jurisdiction to determine questions of fact in those proceedings is exclusive and its findings of fact made therein are therefore, when based upon evidence, final and conclusive and binding upon the courts of the country: *Barden v. Northern Pacific Ry. Co.*, 154 U. S. 288; but while its findings on questions of law are entitled to great respect by the courts they are not binding upon them, if for no other reason than that the Interior Department is a branch of the Executive Department of the Government, and therefore cannot, in construing statutes, exercise judicial powers to an extent which will deprive the courts of power to declare its construction of laws erroneous whenever it is erroneous. There is no law by which an appeal may be taken from the decision of a question of law by the head of the Interior Department to any court which is a part of the judicial branch of our system of government. The cases wherein courts have held erroneous, in collateral proceedings, the construction of laws and their application to facts found by the executive department are too numerous to require citation of authorities to show the existence of the power, which is derived directly from the very nature of our system of government, under the fundamental principles of which every person has a right to his day in court, and need not be dependent for his rights

upon an executive officer's notions of what the law is. Ours is a government of law, and not of men.

Now, in the case at bar, the officers of the Interior Department have construed the granting statute and the joint resolution to make it their duty to issue to the railroad company patents for the lands answering the record description set forth in the grant "expressly saving and reserving," "all mineral lands," by making the patent express that the United States had granted and did grant such of the lands described in the patent as are non-mineral, and did not, either by the statute or the patent, grant such of them as are mineral. Such is plainly the meaning of the language of the patent. Whether it is effective evidence of title in the grantee to these mineral lands raises the following questions of law:

"Did the facts found by the department before the patent was issued, warrant the issuance of the patent issued, or did those facts warrant the issuance of a patent stating that the granting statute and the patent passed an unqualified title to the grantee of all the lands described in the patent?

(A) If the department had made no decision as to the mineral or non-mineral character of any of the lands described in the patent.

(B) If the department had decided that all

of the lands described in the patent were non-mineral.

(C) If the department had decided that all of the lands described in the patent were mineral, but were not known at the date of the grant, to be mineral.

(D) If the department had decided, or had reason to believe that some of the lands described in the patent were mineral, and that some of them were non-mineral.

The court may have no difficulty in answering correctly all of these hypothetical questions, but that is not the point. The point is, that the court cannot tell whether the officers of the executive department answered any or all of these questions of law correctly without first determining accurately what, if anything, the department had previously determined regarding the mineral or non-mineral character of each and every parcel of land described in the patent. The court cannot, therefore, determine whether the executive officers construed and applied the law correctly or erroneously or acted within or tried to transcend the powers conferred upon them by law, unless the records of the departmental proceedings wherein the patent was issued show affirmatively what questions of fact were decided, and what the decisions of them were.

It follows, necessary, from these observations that the patent is a nullity or is valid according

to its terms and import. In either case the title to these mineral lands could not pass to the railroad company.

6. *Neither the patent issued nor the issuance thereof creates a presumption that the lands therein described are non-mineral.*

The defendants attempt to avoid this difficulty of showing from the record the adjudication of questions of facts necessary to establish their title by way of estoppel by contending that the *issuance* of the patent creates a conclusive presumption of law, that the department adjudged all the lands described in the patent to be non-mineral before issuing the patent, because such an adjudication was a necessary pre-requisite to the lawful issuance thereof. The Circuit Court allowed that contention, and held that, therefore, the mineral exception clause in the patent was inserted without authority of law and was inoperative, void and of no effect to save and reserve to the United States any mineral lands described in the patent.

Let us see to what absurdities this doctrine will lead. It is based upon the argument that neither the record of the proceedings wherein the patent was issued, nor the patent itself shows affirmatively, that the land was adjudged mineral, or that it was adjudged non-mineral, and that therefore it must be conclusively presumed:

1. That the officers would not have included the lands in controversy in this suit in the patent if they had known that they were mineral; and,

2. That if they did not know that these lands were mineral, it must be conclusively presumed that they decided that they were non-mineral.

This doctrine and the ruling which allowed it, if permitted to stand, would inevitably confer upon officers of the executive department of the Government, sitting as as pecial inferior tribunal with limited jurisdiction, all of the powers of courts of both general and final appellate jurisdiction on all questions of law arising in the course of their proceedings, provided only that they unlawfully neglect and refuse to set forth, in the records or their proceedings, the facts upon which they apply the law. In reply to any complaint of their erroneous construction, or even wicked disregard of the law, it would be sufficient answer to say:

The record does not show the findings of fact upon which they decided the questions of law which are claimed to be erroneous; it cannot be determined that the decision was erroneous, or that it was correct; the departmental decision of the questions of fact upon which the law was applied, is final, whatever it was; it must be conclusively presumed that the construction and application of the law, whatever they were, to those facts, were correct; there is no provision of law

whereby an appeal on any question of law may be taken to any court which is part of our judicial system. There is no record upon which an appeal may be taken, or which will enable any court, in any separate proceedings, to determine, whether or not, the department misconstrued, or misapplied the law.

Thus would the executive department of the government be able to usurp and exclusively exercise judicial function in construing laws, contrary to the constitution and laws as construed by the courts. The only condition precedent to usurpation of this power, would be that the executive officers disobey the law and not keep records of their proceedings, or be presumed not to have kept them, while the fact that the law provides that they shall keep such records, and that the fact that they do keep them, (because the law requires it and because being a special inferior tribunal of limited jurisdiction, the making of complete records is necessary to the validity of their final judgments), raise the conclusive presumption that, if they had decided that the land was non-mineral, there would be a record of that decision, and that if no such record exists, no such decision was ever made.

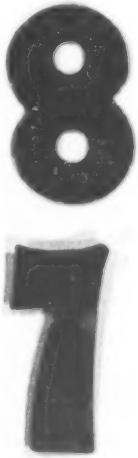
If the contention of the appellees and the ruling of the circuit court in accordance therewith be permitted to stand, the fact, established by presumption, that this special inferior tribunal, has

disregarded the law in that it made no record of its decision of a question of fact, the making of which was necessary to give it jurisdiction and to enable the courts to determine whether its construction of the law was correct or erroneous, becomes the basis of another conclusive presumption that the same tribunal, in the same proceedings, construed and applied the law correctly. Then, as if further to demonstrate the inconsistency of these presumptions, the appellees claim that this same tribunal, in the same proceedings, erroneously decided that the land was non-mineral, and erroneously construed the law to authorize them to insert in the patent a clause designed and intended to save and reserve to the United States mineral lands which it had previously in same proceedings decided did not exist.

All of these inconsistent and contradictory results which would necessarily follow from this alleged conclusive presumption which defendants seek to invoke, are due to an erroneous assumption that decisions of questions of law by this special, technically inferior tribunal, composed of officers of the executive department, and which forms no part of the judicial branch of our system of government, and from which there is no appeal to any court which does form a part of the judicial branch of that system, are final and conclusive, while the law is that its decision of questions of fact are, when based upon evidence,

final and conclusive, except in cases of fraud, but that its decisions of questions of law are not final, because it has no final or exclusive jurisdiction to decide questions of law, and no appeal lies from it to any *court* to correct its errors in law.

All these difficulties disappear with the application of the rule of law that the executive officers of the government, acting as a special tribunal,—inferior in the technical sense,—must state in the record of their proceedings wherein the patent was issued, and in the patent itself, their decision as to the mineral or non-mineral character of the land, in order that the courts may be enabled to determine whether, under the facts found by the department there was any authority of law for the issuance of the patent issued, and also whether it had authority, upon facts decided, to issue some other and different patent which it did not issue. Every finding of fact necessary to show authority of law for the issuance of the patent issued, must appear on the face of the records of the proceedings, or they are nullities. Therefore, if the record does not show affirmatively that the department decided that all of the lands described in the patent were mineral, or that they were non-mineral, it certainly cannot on the theory that this inferior tribunal must be conclusively presumed to decide correctly the question of the character of the land, which is admitted to be mineral, be conclusively presumed,



that they decided erroneously that they are non-mineral.

A decision that the land was non-mineral could not be a necessary pre-requisite to the issuance of the patent issued, which purports not to pass title to such of the lands as are mineral; therefore *the patent issued* can raise no presumption that such decision was made. The existence of a patent purporting to pass an absolute title to all the lands described in it might raise such a presumption (and it might not), but no such patent exists in this case and therefore no such presumption arises or exists.

He who alleges an erroneous decision by any tribunal must show it, and in this case, because of the nature of the tribunal which issued the patent and its limited powers, such decision must be shown, if at all, from the record of the proceedings wherein the error is alleged to have been committed. It must not be forgotten that presumptions, and especially conclusive presumptions of law in cases like this one are indulged by courts to uphold the final acts of public officials, and therefore necessarily arise from the *nature and import of the final act done.* The nature and import of the final act determines what must be presumed and the presumption never determines the nature or import of the final act and alters the record. A presumption is nothing more nor less than a logical inference deducible

from facts and circumstances known—in this case the existence of a patent. It is inconsistent with reason to say that such inference which owes its existence to the patent can change that patent so that it will create, by way of another inference, another presumption inconsistent with the existing patent from which the original inference arises.

The appellees have attempted in this case to distinguish between the effect of the patent and the effect of the act of issuing it, and to claim that the *issuance* of it raised a conclusive presumption that the land described in it is non-mineral. The obvious answer to that suggestion is that the patent is a perfect record of the act of issuing it and imports absolute verity of the nature and purpose of that act.

This very case affords a fine illustration of the fallacy of the appellees' contention that the patent issued creates a conclusive presumption that all the lands therein described are non-mineral, or, in another form—that the issuance of the patent was a complete adjudication that all the land described in it is non-mineral. The patent purports to pass title of such of the lands therein described as are non-mineral and not to pass title to such of them as are mineral. By what process of logic or reason can it be inferred that the officers who prepared such a patent had previously decided that all the lands described in it were non-

mineral? It is reasonable or logical to *presume* that they meant to exclude from the effect of the patent mineral lands which they had decided did not exist? The fact that they undertook to exclude mineral lands from the effect of the patent is not only evidence but it amounts to proof that they were satisfied that some of the lands described in the patent were mineral. The fallacy of the appellees' argument on this point is apparent in this: They assume that the officers who issued the patent had no authority in law to issue the patent which they did issue, and that they ought to have issued another and different kind of patent, viz.: One purporting to pass an absolute title to all the lands described in the patent issued. Then from such patent, which they claim ought to have been but was not issued, they deduce their alleged conclusive presumption and then apply it to another kind of patent actually issued for the purpose of changing, by some unknown species of legal fiction, the patent issued in such manner that it will read as they want it to read and so raise the conclusive presumption which is claimed to work this change of the record. The difficulty is that no patent which could give rise to the alleged presumption was ever made or issued for the lands in controversy, and therefor no such presumption concerning these lands ever existed. The validity of the patent issued does not require a previous decision by

the officers that the land is non-mineral. Therefore it raises no presumption that such decision was made.

We do not contend that if the department has decided in a contest that all the lands described in the patent are non-mineral, we have a right to show in this case that such decision was erroneous, but we do contend:

1. That neither the patent nor the record of the proceedings wherein it was issued shows that such decision was made, and that it can be shown from no other source.

2. That both the record and the patent shows affirmatively that such decision was not made.

3. That such decision cannot be presumed to have been made because the record leaves no room for such presumption.

The officers of the Interior Department had authority in law to issue the patent pleaded in this cause, which purports to pass to the railroad company such of the lands therein described as are non-mineral and not to pass title to it of such of them as are mineral.

The views of the Circuit Court, as to the effect of the saving clause in the patent, are tersely stated in its opinion as follows:

> "There is absolutely nothing in the saving clause of the joint resolution either requiring or authorizing the patent thereby directed to be issued for the granted lands to contain

those conditions or restrictions or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainant's counsel is correct that by the joint resolution of June 28th, 1870, congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all lands to which the United States did not have full title, and which were not free from preemption or other claims or rights at the time the line of the grantee's road was designated by the plat thereof, filed in the office of the commissioner of the general land office. There is no escape from this conclusion, for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none."

In the first place there is a manifest difference between *authorizing* these conditions and restrictions to be saved and reserved in the issuing of the patent, and *authorizing and requiring* them to be saved and reversed by any particular means or method in the issuing of the patent.

The inherent powers of the executive department are ample authority under these acts for the issuance of the patent issued thereunder. Neither the act or the joint resolution directs the secretary of the interior or any other government official to save and reserve the restrictions of the grant to mineral lands by determining prior to the issuance of the patent what of the odd numbered sections within the limits of the grant are mineral and what are non-mineral, and to include in the patent only non-mineral lands; nor does either the act or the joint resolution specify any other method or means by which these restrictions and conditions are to be saved or reserved in the issuing of the patent; but they clearly make it the duty of the secretary of the interior "to cause patents to be issued to said company for the sections of land coterminous to each constructed section of land reported on as aforesaid to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

This language is a clear direction to the secretary of the interior to cause to be issued patents expressly saving and reserving the specific conditions and restrictions contained in the third section of said act; and under it the patent must express, *in some way*, the saving and reserving of

all these conditions and restrictions which are, in respect to the means by which one could determine to what lands they apply, of two classes:

1. The records of the land office required by law to be kept would reveal of what of the lands the United States had full title, and what of the lands were not reserved, sold, granted or otherwise appropriated, and what of the lands were free from pre-emption or other claims or rights at the time the line of the road was definitely fixed.

2. The records of the land office would not show what of the lands within the limits of the grant were mineral and what were non-mineral, for the simple reason that there had been no record of all mineral lands made, nor was there any provision of law for the making of such a record, and the mineral or non-mineral character of the land within the limits of the grant could be determined only after extensive exploration and examination of all of the lands.

The officers of the interior department expressed, in the patent, the savings of the restrictions and conditions of the former class by examining the records of the land office and including in the description of the patent only lands to which these conditions and restrictions did not apply, and also by distinct recitals in the patent showing that none of the lands therein described were subject to claims or rights which brought

them within any conditions or restrictions of the former class.

The officers could not determine from the records of the land office what of the lands were non-mineral; they made no examination of the land themselves with a view to determining their mineral or non-mineral character, but sought to save and reserve the limitation and restriction of the grant to non-mineral lands by issuing a patent which would pass title to such of the lands as were non-mineral and would not pass title to such of them as were mineral.

The means by which, and the manner in which those officers should have saved and reserved these conditions and restrictions of the grant were, in the absence of specific directions prescribed by law, matters entirely within their discretion, and it is not necessary for them to show affirmative statutory authority for everything they do in the discharge of their duties, much less for the methods or means by which they accomplish the results required by the acts of congress. This was settled as early as 1833 in United States v. Macdaniel, 7 Pet. 1.

McDaniel had been a clerk in the navy department at a salary of $1400 per year for 15 years, and had also acted as agent of the government in paying pensions and had been allowed commissions on his pension disbursements as such agent. Under a new construction of the statute by the

department he was not entitled to these commissions and the United States sued him to recover $988.96 which he did not owe if these commissions were allowed to him. This court held that the custom or usage which had obtained in the department under the former construction of the statute was binding as to past transactions and that McDaniel was entitled to the commissions and that the United States could not recover them from him. In that case the court said:

> "A practical knowledge of the action of one of the great departments of the government must convince every person that the head of the department, in the distribution of duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his power by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of the government would evince a most unpardonable ignorance of the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the government; hence,, of necessity, usages have been established in every department of the government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits,

> and no changes of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction of it, and must be considered binding on past transactions."

To the same effect are:

United States v. Brown, 92 U. S. 763;
United States v. Philbrick, 120 U. S. 53, 58-59;
Robertson v. Downey, 127 U. S. 607, 613;
Hastings etc. R. R. Co. v. Whitney, 132 U. S. 357, 366;
Pennoyer v. Connaughy, 140 U. S. 1, 23.

It is true that in December, 1904, ten years after the patent in this case was issued, a decision was made by the Interior Department, upon the *ex parte* application of the Northern Pacific Railroad Company, that there is no authority of law for the insertion of the mineral exception clause in the patent. (32 L. D. 342.) But it will be remembered that a commission was appointed under Act of Congress to examine the lands under that grant and determine their character. (28 Stat. 683.)

That ruling was applied to patents issued under all railroad land acts, but it is entirely inconsistent with the authorities cited to sustain it, and it bears internal evidence of lack of the discrimination and diligence which an officer of the government ought always to exercise in matters

wherein such enormous interests of the United States are involved. But, that decision could not affect the force and effect of the clause as it was inserted in the patents prior to that time under a construction of the statute which was acquiesced in by the railroad company.

The cross-bill alleges and the demurrer admits that for the forty years immediately preceding the issuance of this patent it had been the uniform custom of the Interior Department to issue, under all railroad land grants, patents containing the mineral exception clause found in this patent, which was issued in conformity to that custom. This custom arose and obtained during all that time under the same construction of these grants by many successive Secretaries of the Interior, and none of them doubted that these patents were effective to save the mineral land therein described to the United States. Hundreds of thousands of acres of the most valuable mineral lands in the western states have been included in the descriptions of such patents issued under these grants to railroad companies which *have accepted them, without protest, and with full knowledge of their nature and import, and with full knowledge of the fact that the reason why the patent purports to except mineral lands is that there had been no prior examination and determination of the character of the land, and that the government officials relied upon the import of*

the patent prepared and issued under this construction of the statute to save mineral lands to the United States.

Now, the question is, whether the action of the department in undertaking to save and reserve the limitation of the grant to non-mineral lands, by incorporating in the patent a saving clause, shall be binding and effective as to past transactions to keep the grant limited to non-mineral lands, or whether that clause which, if effective, will accomplish the intention of Congress, shall be adjudged void and the rest of the patent valid, and the will and intention of Congress expressed in the statute and patent be defeated and hundreds of millions of dollars worth of mineral lands, which Congress has said should not pass by operation of this grant, be turned over under it to this corporation, contrary to the express provisions of its grant.

It must be remembered that if the government officers had no authority to issue the patent which they did issue, yet the fact remains that *they issued none other.*

No injury can result to the railroad company from an adjudication that the patent is effective to save and reserve mineral lands to the government, for it would deprive the railroad company of nothing which was granted, while if it is not held effective, the railroad company will acquire title to lands which it is by law prohibited to ac-

quire under the grant. If it is held effective they can select lieu lands.

The discussion of the joint resolutions in the senate does not show that the saving clause thereof was intended only to protect actual settlers.

The Circuit Court was of the opinion that the discussion in the senate of the joint resolution, at the time it was passed by that body, shows that the clause in the joint resolution:—"expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided in the third section of said act"—was solely for the purpose of protecting actual settlers upon the lands along the line of the road, and that the resolution furnished no authority for the issuance of a patent containing a mineral exception clause.

This descussion is found in the Congressional Globe, part 5, second session, 41st Congress, 1869-70, May 31st, 1870, pp. 3350-51-52-53. Practically all that was said in the discussion was said by Senator Casserly of California. He desired to have the senate adopt in place of the language of the resolution last above quoted, the following language as a part of the resolution:

"And provided, that all persons who before the passage of this joint resolution shall have located themselves as actual settlers upon any portion of the lands affected by this joint resolution, or by

the said act of July 27, 1866, or included in the lands withdrawn by order of the Secretary of the Interior of March 18, 1867, or at any other time, for or on account of said Southern Pacific Railroad Company, whether such persons shall have so located themselves before or after such withdrawal, shall have the right to enter, under the homestead or pre-emption laws of the United States, the lands upon which they have so located themselves in the quantities allowed by said laws, and upon the terms provided thereby."

It will be noted that this amendment which Mr. Casserly desired substituted for the amendment which was adopted, says absolutely nothing about saving anything but the rights of actual settlers, while the amendment which was adopted, viz.—"Expressly saving and reserving of the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act"—includes all the conditions and restrictions of the third section of the Act of July 27, 1866. The court evidently became confused on this point, for certainly what was said by Mr. Casserly in the senate at the time the joint resolution was passed furnishes no aid in the construction of the resolution as it was passed. The amendment which Mr. Casserly desired was rejected, which was a rejection of his argument.

Moreover, it will be noticed that the joint resolution of June 28th, 1870, says that the company

may construct its road *as near as may be* on the route designated by the map filed by said company in the Interior Department on the 3rd of January, 1867. The route indicated by that map has always been considered as the general route, and the map, as the map of general location and not of definite location; therefore, the rights of actual settlers upon the land were fully protected under the Act of July 27th, 1866, for the simple reason that the railroad company could acquire no right to any land along the line of the road until the map of *definite* location was filed, and it had not been filed at the time the joint resolution was passed.

Southern Pacific Company v. Rahall, 3 L. D. 321.

It is therefore clear that the clause in the joint resolution requiring the saving in the patent of the conditions and restrictions contained in the 3rd section of the Act of June 27th, 1866, was for some special purpose, and that purpose could be nothing else than to authorize the Secretary of the Interior to insert in the patent an appropriate clause to save and reserve to the United States those restrictions and conditions of the grant in cases where the records of the land office did not show to what lands those restrictions and conditions applied, and those records would show what lands were occupied by settlers, but would not show what were mineral.

1. (c) *The weight of authority is to the effect that the saving clause in the patent is effective and limits the title of the railroad company to lands non-mineral in fact.*

Cowell v. Lammers, 21 Fed. 200, is a case upon which appellees rely to establish the invalidity of the mineral exception clause contained in the patent. In that case the patent was issued under a railroad land grant which provided, "That all mineral lands *shall be excepted* from the operation of this act" and the patent contained the clause "Yet excluding and excepting all mineral lands should any such be found to exist in the contracts described in the foregoing."

Judge Sawyer, who wrote the opinion in that case and in *Francoeur v. Newhouse, infra,* was committed to the proposition that the granting statute excepted from its operations only lands known at the time of the grant to be non-mineral. It appears from the recital of facts in that case that the land was in the actual possession of another who had purchased it from the railroad company, and prior to the patenting of it to the railroad company the land had been worked as a placer mining claim and had been abandoned because it did not pay, and that at the time the patent was issued the land was considered of no value as mineral land. Judge Sawyer held that a mineral locator could initiate no right upon the land when it was in the actual possession of an-

other under color of title. It is true that he also held that there was no authority in the statute for the insertion of a clause in the patent excluding mineral land from the conveyance. As a reason for this he states that the records and notes of the survey are the evidence upon which the character of the land must be determined *prima facia*. This holding, of course, was overruled in the Barden case, where it is distinctly held that the law does not contemplate the ascertainment of the mineral or non-mineral character of the land from the field notes of the survey, but that the information furnished by those notes is gathered incidently for the use of the Interior Department. He also holds that such an exception could in no case apply to mineral lands which were not at the date of the patent known to be mineral. This ruling was evidently based on the fact that the exception of all mineral lands from the operations of the statute which made that grant was not *in praesenti* but was rather a direction for the exclusion of them by the officers.

Francoeur v. Newhouse, 40 Fed. 318, upon which appellees also rely further explains the position of Judge Sawyer and his consideration of the statute in Cowels v. Lammers. In Cowels v. Lammers, he held, among other things, that the exception in the patent only applied to lands known at the date of the patent to be mineral, and as the word "known" was not in the patent, he

saw that to be consistent he must hold in Francoeur v. Newhouse that the statute, which did not contain the word "known" in the exclusion of mineral lands, must also be construed to mean lands *known* at the date of the grant to be mineral, if the decision in Cowels v. Lammers was correct.

Judge Sawyer was certainly consistent in this, but it is not consistent to say that the language of the granting *act*, "all mineral lands," means all mineral lands known or unknown, and that the same language in the patent includes all known mineral lands but not any unknown mineral lands. There is no reason for construing this language as meaning one thing when used in the patent and meaning something else when used in the statute. Therefore, we say that the exclusion clause contained in the patent was interpreted by this court in the Barden case when, in interpreted the clause excluding all mineral lands from the operations of the statute, it is said that "all mineral lands" means *all mineral lands*, and does not mean "all *known* mineral lands."

Judge Sawyer was of the opinion that only lands known to be mineral at the date of the grant were excluded from the operation thereof, and this opinion was the basis of his decision both in the case of Cowell v. Lammers and Francoeur v. Newhouse. Both of these cases were decided before the opinion in Barden v. Northern Pacific,

154 U. S. 288, was written, and when this court held in that case that the words "All mineral lands" mean all mineral lands whether known or unknown, and that they do not mean "All known mineral lands," all the reasoning of Judge Sawyer was of no avail. It is not too much to say that the Barden case deprives both the cases, Cowell v. Lammers and Francoeur v. Newhouse, of all their force as authorities. The Barden case also states that the officers of the Interior Department may lawfully insert in the patent a clause excepting mineral land if they have not made sufficient examination of the land described in the patent to justify their statement in it that all the land therein described is non-mineral.

Shaw v. Kellogg, 170 U. S. 312, is another case upon which appellees relied to sustain their contention in the case at bar, and it does not, for the reason that in that case there was a decision of record by the proper officers, after an examination and determination, that the land was non-mineral in fact. The grant was of a privilege to the heirs of one Baca, who claimed the land upon which Los Vegas in New Mexico is located, to select in lieu thereof "an equal quality of vacant land, non-mineral, in the territory of New Mexico" and the Act of Congress made it "the duty of the surveyor general of New Mexico to make survey and location of the land so selected" upon application to him by the beneficiaries of the grant.

Instructions were sent to the surveyor general by the General Land Office to the effect that his certificate of the survey and location to the General Land Office "must be accompanied by a statement from the register and receiver that the land is vacant and not mineral." Application was made by the beneficiaries of the grant for a survey. The surveyor general of Colorado in whose jurisdiction the territory wherein the selection was made had been included, wrote the General Land Office, "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and he intended to locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the General Land Office informed him also, directly, that his certificate of the survey and location "must be accompanied by the certificates of the surveyor general and the register and receiver, that the land selected is vacant and non-mineral," and added:

> "Especially should the character of the locations as to minerals be carefully ascertained after the important statement of Ex-Governor Gilpin which you communicated in your official letter to this office. When you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to to do so, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office."

Survey of the land was made under contract with one Sheldon which was disapproved and the surveyor general was again told that the certificate of the survey and location must be accompanied by the certificates of the surveyor general and the register and receiver, that the land is vacant and not mineral.

Thereafter the surveyor general sent to the General Land Office the following certificates as to the character of the land:

"Denver, C. T., Dec. 15, 1863.

Sir:—

This is to certify that from good and sufficient evidence, I am perfectly satisfied that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinius Z. Sheldon in November, 1863, is not mineral and is vacant.

Very truly your obedient servant,

JOHN PIERCE,

Surveyor General of Colo. & Utah."

"Colo. Ty. Golden City, Dec. 5, 1863.

Sir:

This is to certify that from good and sufficient evidence, we are perfectly satisfied

that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinius Z. Sheldon, in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,
Register Land Office Colo. District.
C. B. CLEMENTS.
Receiver Land Office Colo. Ty."

To this the General Land Office replied:

"Evidence furnished by you is not sufficient in the opinion of this office to prove that the selection of No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon information and conclusions deduced from reason. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of Ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality."

On Feb. 12, 1864, the General Land Office again wrote to the surveyor general in part as follows:

"The difficulty, however, may be avoided by pursuing the following course: The general field notes duly verified and authenticated, must be filed in the surveyor general's office of Colo.; upon bringing these to the usual satisfactory tests and finding the same all regular and correct, you are authorized in virtue of the aforesaid sixth section of said Act of June 21, 1860, to approve the said sur-

> vey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist."

This was plainly an adoption of the survey made by Sheldon as the survey of the surveyor general after satisfactory tests and examination of that survey by him, and after the determination by him that the survey was correct. The field notes of this survey, given on pages 322 and 323, set forth a very careful statement as to the character of this land and concludes with this statement:

> "Saw no indications of the precious metals or other minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes."

The map of the survey was also filed and approved by the surveyor general.

On January 14, 1868, application for patent was made and refused on the ground that the statute did not authorize the issuance of the patent, and in denying the application the commissioner of the General Land Office called attention to the fact that before locating the land "the surveyor general had expressly found and certified that this land was not mineral" and the construction placed upon that act by the Interior De-

partment is set forth by the commissioner in his letter as follows:

> "The condition and provisions of the Act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location when the title passed to be non-mineral land."

It will be noted that there was in this granting act no provisions excepting mineral lands from the *operations* of the act. The land was not granted *in praesenti* by the statute. No title could pass under the statute until the determination and decision was made by the proper officers that the land was non-mineral, and that when such decision was made the title passed and that the decision that it was non-mineral was made by the proper officers, and the records of the proceedings for the *passing of the title by the officers of the department, showed that the necessary decision as to the character of the land was made.*

This case is clearly an authority for the proposition that whenever a grant not *in praesenti* of public lands, of any particular character is made, either by the statute or by a patent, to vest absolute title in the grantee, there must be a determination by the proper officers that the land is of the character granted and that such determination must appear as a part of the records of the proceedings of the officers of the Interior Department, whose duty

it is to carry the grant into effect. That the court considered such finding and record necessary to the passing of the title, is evidenced in this opinion by a quotation from the case of Deffenback v. Hawke, 115 U. S. 392, 404, as follows: "The land officers who are merely agents of the law, had no authority to insert in the patent any other terms than those of the conveyance *with recitals showing compliance with the law and the conditions which it prescribes*" (italics ours), and also by the court's consideration of the decision made in the Barden case. Speaking of that case at page 339, Justice Brewer, who dissented in the Barden case, uses the following language: "It is true there was a division of opinion, but that division was only as to the time at which *and the means by which the non-mineral character of the land was settled.*" (Italics ours.) That an examination and determination of the character of the land and the statement of that determination in the patent were the *means* by which the character of the land should be settled, is further evidenced by other quotations from the Barden case in Shaw v. Kellogg, as follows: "It can hear evidence upon and determine the character of lands to which the parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimants the patent provided by law, *specifying that the lands are of the character for which patent is au-*

thorized" (italics ours); and again, "the fact remains that under the law the duty of determining the character of the lands granted by Congress *and stating it in instruments transferring the title* of the Government to the grantee, reposes in officers of the Land Department." (Italics ours.)

The grants under the statute considered in Shaw v. Kellogg was completed by the selection, the survey and location of the land and the finding by the proper officers that the land was non-mineral. The evidence of the title was the records of these proceedings. No one will contend that if the records of those proceedings did not show affirmatively a determination that the land was non-mineral, the title could have passed.

McLaughlin v. Powell, 50 Cal. 64.

In this case plaintiff held by mesne conveyance from the railroad company, which claimed to have acquired title by a patent dated May 31, 1870, issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The patent contained the clause:

"Yet excluding and excepting from the transfer by these presents 'all mineral lands' should any be found to exist in the tracts described in the foregoing."

The defendant offered to prove that the land was mineral land, that he had held it as a mining claim since October, 1866. The trial court excluded this evidence and the plaintiff recovered.

The Supreme Court reversed the case for the exclusion of this evidence and said:

> "The exception contained in the patent is part of the description and is equivalent to an exception of all of the subdivisions of land mentioned, which are 'mineral lands,' in other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral lands and does not necessarily extend to all the tracts granted.
>
> "We think the defendant should have been allowed to prove that the demanded premises were mineral lands. Judgment reversed."
>
> Chicago Quartz Mining Co. v. Oliver, 75 Cal. 194.

The land was claimed by mesne conveyance from the railroad company who claimed to have acquired title by patent issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The defendant claimed under the mining patent dated August 16, 1883, the court below found that the land in dispute had been known and worked as mineral land since 1861. The patent to the railroad company contained the following clause:

"Yet excluding and excepting from the transfer by these presents 'all mineral lands', should any be found in the tracts described in the foregoing."

The court held that the mining patent of 1883

was valid and that the land did not pass to the railroad company under its patent issued under the railroad land grant.

Gale v. Best, 78 Cal. 235.

The plaintiff sued and recovered land from the defendant. Plaintiff held it by mesne conveyance from a railroad company under a grant by Congress. The granting act excluding all mineral lands. The patent issued under that grant *contains no clause excepting or excluding mineral lands from the operations of the patent.* The defendant in 1885 located the land as mineral and began mining operations thereon; the court held that as there was no reservation or exception of mineral lands in the patent, the patent raised a conclusive presumption, against collateral attack, that the land was non-mineral, and the plaintiff recovered. In this case the court affirmed the doctrine of McLaughlin v. Powell, *supra,* and Chicago Quartz Mining Company v. Oliver, *supra,* and said that those cases differed from the one then at bar *because in those cases the patent excepted "all mineral lands" should any such be found therein.*

In Van Ness v. Rooney, 160 Cal. 131, the Supreme Court of the state of California reaffirmed the doctrine of McLaughlin v. Powell and Chicago Quartz Mining Company v. Oliver, and held the mineral exception clause in the patent valid.

That the Federal statute of March 2, 1896, was not applicable to a patent containing such mineral exception clause, and that such patent does not create a conclusive presumption that the lands therein described are non-mineral, and that the mineral exception clause is a part of the description of the land mentioned in the patent.

In Eastern Oregon Land Company v. Willow River Land and Irrigation Company, 187 Fed. 466, an opinion by Judge Bean held that the railroad land grant patent containing the clause "yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid," "manifests an intention on the part of the government not to convey mineral lands and repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral."

Here is an unbroken line of authorities that the mineral exception clause contained in the patent here pleaded is valid and effective and prevents mineral lands from passing either by the granting act or the patent.

To these must be added the statement of this court in the Barden case:

> "The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, *without excepting mineral lands,* until it has had an opportunity to have the country, or that part of it for which patent is sought, sufficiently explored

> to justify its declaration *in the patent*, which would be taken as its determination, that no mineral lands exist therein." (Italics ours.)

The only way they could except mineral lands before the country had been "sufficiently explored to justify its *declaration in the patent*, which would be taken as its determination, that no mineral lands exist therein," was by inserting in the patent the mineral exception clause, which they did insert; and it should be noted that the purpose of "excepting mineral" lands was, under the above language, to withhold title of *unknown* mineral lands.

It appears conclusively from the foregoing observations *that the granting statute is the appellees' only source of title in this case.*

V.

Petroleum or Mineral Oil is Within the Meaning of the Term Mineral as it was Used in the Acts of Congress Reserving Mineral Lands From the Railroad Land Grants.

This court has uniformly held that the exclusion of all mineral lands from the operations of such acts is a limitation intended for the benefit of the public, and must be liberally construed and strictly enforced to carry out its purpose and give effect to the intent of the statute. A necessary corollary to this proposition is, that the term mineral should be interpreted to include all natural deposits in the earth's crust, which give to the lands in which they are found the natural advantages on account of which Congress reserved all mineral lands from the grants. This forbids the application of the broad definition of mineral as an inorganic substance found in the earth, and likewise forbids a definition which will restrict the interpretation of the term, to metaliferous minerals. The *natural advantage* of mineral lands was the reason which induced Congress to reserve them, and that advantage is due entirely to the *value* of their *natural deposits,* without regard to whether they were metaliferous or non-metaliferou fosiliferous, argill aceous, or solid, liquid or gaseous. These peculiarities or properties of various minerals are not determinative of their

relative values and therefore are not a proper basis of determining whether they are within or without the term mineral as used in an Act of Congress.

The circumstances under which these grants were made are sufficient reason for holding that the value of the mineral in the lands is determinative of whether they are mineral or non-mineral within the meaning of the acts. The territory through which the roads would pass was unexplored. No one knew the extent or value, present or prospective, of the natural deposits which were stored in them. In estimating the amount of land which it would be proper to grant it was necessary to consider its value with the road completed. If the grant were confined to lands not mineral, Congress could estimate with some degree of accuracy the value of public property which the grant made would include; but if it were not so limited no one could estimate the value of the grant for in such case it was not only possible, but was probable that the land opposite a small portion of the road would be of more value than the entire railroad built under the grant and all other property necessary to the operation of the road. And, indeed, this very thing has turned out to be true in the case of petroleum lands in California, if this court holds that petroleum is not a mineral within the meaning of this granting act.

It is clear from these considerations that the value, present and prospective, of a mineral deposit, taking into account both its quantity and quality, is the proper basis for determining, under these grants, whether lands are mineral or non-mineral. Such is the rule uniformly applied by the government in administering our public land laws. The fact that a deposit of mineral is not of present value, on account of insufficient transportation facilities or the uninhabited condition of the country wherein it is found, has never been regarded by the government as sufficient ground for classifying the land in which it is found as non-mineral. A wise public policy looks to the future.

At the date of this grant—so far as this question is concerned, June 28, 1870,—the date of the point resolution, without which the railroad company could not have acquired this grant, petroleum or mineral oil was being extensively produced in this country and was recognized as a natural deposit of great value. It was obtained from Sicily by the Romans and used for illuminating. It was discovered in large quantities in Pennsylvania in 1859, and in 1865, 2,497,700 barrels of it were produced in this country; in 1870, 5,200,745 barrels were produced. In 1860, 100 square miles of land at Oil Creek, Pennsylvania, had been determined to be oil producing.

Vol. 15, p. 670, New International Encyclopaedia.

Therefore, at the date of this grant, petroleum or mineral oil was known to be a mineral product of great value and was being produced in this country and was an article of commerce and trade.

In 1859 "The news of its discovery was followed by a rush of adventurers from all parts of the country, so that in 1860 100 square miles of territory in the vicinity of Oil Creek (Pa.) had been shown to be productive." *Id.* This "rush" of people to the oil fields in 1859 shows very clearly that oil was known, before 1870, or even 1866, to be a mineral produce of value sufficient to warrant its production for profit. Fortunes were made in a day by its discovery on a small parcel of ground before this railroad company acquired its grant.

"The growth of the petroleum industry in the United States is shown in the following table which gives the annual production at intervals from 1859 to 1905:

Years.	Barrels.
1859	2,000
1860	500,000
1865	2,497,700
1870	5,200,745
1875	10,926,945
1880	26,286,123
1885	21,858,785
1890	45,823,572

1895	52,892,276
1900	63,620,529
1905	134,717,580."

Id., p. 674.

Public lands, valuable for their deposits of petroleum, have always been subject to location, entry and patent under the placer mining laws of the United States, and government's definition of mineral lands is based upon the *value* of the deposits in them, taking into account the quantity and quality of the deposit. Its definition has always included petroleum as a mineral. A review of the government's position in this regard will be found in the case of Union Oil Company (on review) 25 Ld. Dec. 351.

The decision in that case calls attention to the language of the first section of the mining laws, Act of May 10, 1872: "In all cases *lands valuable for minerals* shall be reserved from sale, except as otherwise expressly provided by law," and "all *valuable* mineral deposits in lands belonging to the United States," * * * "and the lands in which they are found" are thrown open to exploration and purchase. The word "mineral" is used here in its broadest sense with the qualification that the deposit must be "valuable" in order to bring it and the land in which it is found under the statute. July 15, 1873, the first departmental circular on the subject of the mining laws was issued. It stated:

"That whatever is recognized as a mineral by the standrad authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the perview of the Mining Act of May the 10th, 1872."

It was further stated:

"The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that Congress intended it as a general mining law, 'to promote the development of the mining resources of the United States,' and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except when a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands."

The commissioner also stated in the same circular that borax, carbonate of soda, nitrate of soda, sulphur, alum and asphalt, as well as 'all valuable mineral deposits' may be applied for and patented under the provisions of the Mining Act of May 10, 1872. (Copp's Mineral Lands, 61.)

On January 30th, 1875, the department also held that lands containing valuable deposits of petroleum may be entered under the mining acts of 1872, (Sickles' Mining Laws, 491), and on March 31, 1882, Commissioner McFarland stated, "Lands containing deposits of petroleum have

been entered as placers and patented as such," and held "that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims."

In the case of W. H. Hooper, 1 L. D. 560, the views expressed in the circular of July 15, 1873, were concurred in and approved by Secretary Kirkwood. In Maxwell v. Brierly, 10 C. L. O. 50, Secretary Teller, after referring to the circular of July 15, 1873, approved its doctrine and held that lands containing "gypsum, limestone, asphaltum, borax, auriferous cement, fireclay, kaolin, mica, marble, petroleum, slate and other substances" were minerals within the mining laws of the United States. This same doctrine is approved in 25 Land Decisions at pages 354 and 355, where it was decided that lands chiefly valuable for oil deposits contained in them may be located, entered and patented under the placer law. And at pages 356-7 the Department reaffirmed its previous decision in the case of Pacific Coast Marble Co. v. Northern Pacific Railroad Co. (25 L. D. 233):

> "That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the perview of the mining law."

And that

> "Lands containing valuable mineral deposits, whether of the metaliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, when they are more valuable on account of such mineral deposits than for agricultural purposes—are 'mineral lands' *within the meaning of that term as used in the exception from the grants to the railroad company and to the state.*" (Italics ours.)

In Gird v. California Oil Co., 60 Fed. 531, 532, it was said on the 26th of February, 1894, that

> "The premises in controversy are oil bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."

The opinion in that case discusses the law relative to mining, location of claims, notice, recording and posting, description, work done, working of oil, etc., and its application to oil claims.

In Northern Pacific v. Soderberg, 188 U. S. 528, this court said:

> "Under the allegations of the bill the fact that the land department had not determined whether the land in question was mineral or non-mineral, does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral under the terms of the grant." Page 528.

That case involved the question whether granite was a mineral within the meaning of the Northern Pacific grant and the court decided that it was and was therefore excluded from the grant. The court discussed at length what is and what is not mineral land or mineral within the meaning of these grants and approves the rulings of the Land Department which include as mineral within the meaning of the granting acts, alum, asphalt, borax, guano, diamonds, gypsum, resin, marble, micca, slate, amber, petroleum, limestone, building stone and coal. Page 534.

That case is conclusive against the contention of the appellees that petroleum is not a mineral within the meaning of this granting act. The decision in that case is clearly based upon the principle that the value of the deposit, taking into account its quantity and quality, is what determines whether the land in which it is found is mineral or non-mineral within the meaning of the granting act.

The question raised by this cause, and to which the determination of the questions certified are incidental, is: Did the *patent issued,* containing, as a part of its description, the clause: "Yet excluding and excepting 'all mineral lands', should any such be found in the tracts aforesaid, but this exception and exclusion shall not be construed to include 'coal and iron' lands," pass title to mineral lands?

The correct determination of this question is of great public importance, for it will be decisive of whether the United States or land grant railroads, have title to mineral lands of the value of a billion of dollars. In the decision of this question this court is entirely unhampered by previous rulings.

We have endeavored to present the case in its logical sequence, with a view to aiding the court in answering the questions certified, and have, in the front part of this brief, inserted an analytical index, giving the pages at which will be found the portions of the brief bearing upon each question certified and for the reasons, herein stated, we respectfully submit that all the questions certified by the court below should be answered adversely to the contentions of appellee.

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and

D. J. Hinkley

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